No. 92-356

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH B. MUMAW,

Petitioner,

v.

NURAD, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The issue presented here is whether a prior owner of property is liable under 42 U.S.C.A. § 9607(a)(2) when no active disposal of hazardous substances occurred during his ownership of the property.

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Fed. R. Civ. P. 54 5

No. _____

IN THE

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OCTOBER TERM, 1992

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KENNETH B. MUMAW,

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NURAD, INCORPORATED,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit will be reported at 966 F.2d 837, and is reprinted in the Appendix ("A-___") at

pages A-1 thru A-40. The unreported opinion and order of the United States District Court for the District of Maryland is reprinted at pages A-41 thru A-144.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 29, 1992. A-2. This Court has jurisdiction pursuant to 42 U.S.C.A. § 9601 et al.

PERTINENT STATUTES

The statutes involved in this case are 42 U.S.C.A. § 6902; 42 U.S.C.A. § 6903(3); 42 U.S.C.A. § 9601(29); 42 U.S.C.A. § 9601(35)(C); and 42 U.S.C.A. § 9607(a). The text of these provisions are set forth at A-145 thru A-151.

STATEMENT OF THE CASE

Nurad, Inc. ("Nurad") seeks to impose liability, under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601 et seq., on Kenneth B. Mumaw ("Mumaw") and others for the cost of removing several old underground storage tanks ("USTs") from property it purchased from Mumaw.

Mumaw purchased property in Baltimore, Maryland on October 13, 1976, and sold that property to Nurad on the same day. Nurad's complaint alleges that USTs containing hazardous substances were present at the time of Mumaw's purchase and sale. In 1987, Nurad was cited by the Maryland Department of the Environment, which required removal or proper abandonment of the USTs. The contents of the tanks were removed and several of the

USTs were either removed or abandoned in place. Soils around the USTs were excavated, tested and found to be non-hazardous, and disposed of.

In February 1990, Nurad initiated suit against former owners, tenants and individuals in the United States District Court for the District of Maryland. Nurad sought recovery of response costs under CERCLA, and cited various common law theories.

Following discovery, several of the parties, including Mumaw, moved for summary judgment.

On August 15, 1991, Judge Nickerson granted Mumaw's, as well as several of the other parties', motion for summary judgment against Nurad. The District Court found that Mumaw was not an owner at the time of disposal because there was no affirmative participation in the disposal

of a hazardous substance, which the Court concluded was a prerequisite to liability under 42 U.S.C.A. § 9607(a)(2). Summary judgment was also granted to Nurad as to another defendant.

On September 6, 1991, Judge Nickerson granted Nurad's Motion for Entry of Judgment under Fed. R. Civ. P. 54. On September 11, 1991, Nurad filed its appeal and a cross-appeal was filed by one of the defendants. The appeals were consolidated pursuant to an October 3, 1991 Court Order. Nurad was designated appellant and the appellees and cross-appellant were required to file a joint brief.

The Court of Appeals reversed the District Court's grant of summary judgment as to Mumaw, finding that active disposal was not required under 42 U.S.C.A. § 9607(a)(2) and remanded the case.

REASONS FOR GRANTING WRIT

This case presents an important question of interpretation of the Superfund Law. Several courts have considered the phrase owner "at the time of disposal" and have generally agreed upon its meaning. In Nurad, however, the Fourth Circuit announced a contrary interpretation.

CERCLA, § 9607(a)(2) imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." CERCLA also imposes liability on a current owner of a facility, any person who arranged for disposal or treatment of hazardous substances, or any person who accepted hazardous substances for transport to disposal facilities. Based on its interpretation of "disposal," the

Fourth Circuit held Mumaw liable. The Court, however, misconstrued § 9607(a)(2) by discussing only the word "disposal" rather than the phrase that actually appears in the statute - "at the time of disposal." Manifestly, "at the time of disposal" is different from "disposal." The Fourth Circuit's decision significantly alters the meaning of CERCLA and should be reviewed and revised.

I. THE FOURTH CIRCUIT'S HOLDING CONFLICTS WITH THE HOLDINGS OF OTHER COURTS

The same question presented in this case was considered in Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991); Ecodyne Corp. v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1989); In re Diamond Reo Trucks, Inc., 115 B.R. 559 (Bkrtcy. W.D. Mich. 1990). All of these Courts reached conclusions contrary

to the Fourth Circuit's decision as to the meaning of owner "at the time of disposal."

In Ecodyne Corp. v. Shah, 718 F. Supp. at 1457, the District Court dismissed an intermediate owner at the summary judgment stage. In construing the term "disposal," the Court looked to the grammar and structure of the Resource Conversation and Recovery Act ("RCRA"), 42 U.S.C.A. § 6903(3):

> The meaning of a word is or may be known from the accompanying words - this is the principle of noscitur a sociis. In ascertaining what disposal means, the Court looks at its definitional components and finds that these three nouns (discharge, deposit and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the Court notes that "placing", read in the context of the statute, means a person introducing -

> putting - formerly controlled or contained hazardous substances into the environment. For plaintiff solipsistically to read, for example, "leaking" as meaning the general migration of chemicals and, as such, a disposal under § 9607(a)(2), renders not only the definitional phrase of RCRA § 6903(3) "into or on any land or water" superfluous, but would also conflict with the general structure of § 9607(a).

Id. The Court concluded that the scope of liability under CERCLA, § 9607(a)(2) does not automatically reach intermediate former owners because:

> To define disposal as plaintiff wishes would effectively make all property owners from the time a site became polluted (up to and including the current owner) potentially liable under § 9607(a)(2) even if these owners did not introduce the chemicals onto the site.

Id.

Other cases have read § 9607(a)(2) as imposing liability on prior owners or operators who actively dispose of or

introduce hazardous substances into the environment. In In re Diamond Reo Trucks, Inc., 115 B.R. at 565, the Court concluded that "the mere ownership of the site during a period of time in which migration or leaching may have taken place, without any active disposal activities, does not bring [the defendant] within the liability provision of § 9607(a)(2)." 3550 Stevens Creek Associates v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990), cert. denied, 111 S.Ct. 2014 (1991), also construed "disposal" for purposes of § 9607(a)(2) as requiring some affirmative act of discarding a substance as a waste. In Snediker, 773 F. Supp. at 989, the Court points out that the plaintiff's "sweeping interpretation of the term disposal would effectively impose cleanup liability on any owner in a chain of title."

II. THE FOURTH CIRCUIT'S HOLDING BROADENS THE SCOPE OF CERCLA BEYOND ITS PLAIN MEANING

In enacting CERCLA, Congress expressly limited the CERCLA liability of former owners to those who owned "at the time of disposal." In its ruling, the Fourth Circuit holds that a current owner is liable irrespective of whether disposal occurs during the term of ownership. In addition, the Fourth Circuit imposes liability on all prior owners and reasons that its decision is in accord with the broad remedial purpose of CERCLA because CERCLA imposes strict liability. This result is not, however, what Congress enacted.

The Fourth Circuit's holding will have far reaching consequences. Interim owners who previously had been regarded as not liable will now be subject to liability and litigation. Parties in

pending CERCLA litigation will seek to add additional interim owners as defendants, increasing the number of parties in such cases and further complicating already complex litigation. The issue will remain unsettled until resolved by this Court.

In future business transactions and real estate sales, purchasers who discover contamination will seek redress from everyone in the chain of title from the time of disposal until the present. It is true, as the Fourth Circuit points out, that the purpose of CERCLA is to encourage "'voluntary private action to remedy environmental hazards.'" A-31 (quoting In re Dant v. Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991)). That statutory purpose does not necessitate broadening the list of parties liable to include all prior owners.

The Fourth Circuit expresses its fear that:

> [A]n owner could avoid liability simply by standing idle while an environmental hazard festers on his property. Such an owner could insulate himself from liability by virtue of his passivity, so long as he transfers the property before any response costs are incurred.

A-32. This statement demonstrates that the Fourth Circuit ignored the provisions of § 9601(35)(C) imposing liability for actual knowledge of and nondisclosure of a release.

CERCLA, § 9601(35)(C) which imposes liability for nondisclosure also becomes meaningless under the Fourth Circuit's decision. Section 9601(35)(C) of CERCLA provides, in pertinent part, that:

> [I]f the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred

> ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

A-148. In reaching its holding, the Fourth Circuit totally disregarded § 9601(35)(C).

If all prior owners are held liable, as the Fourth Circuit's decision requires, the non-disclosure provisions of § 9601(35)(C) are rendered meaningless. Elementary cannons of statutory construction forbid this result. Freytag v. Comm'r of Internal Revenue, 111 S.Ct. 2631 (1991). While it is true, as the Fourth Circuit remarks several times, that CERCLA is to be read broadly to accomplish its remedial purposes, Congress did not intend to make all prior owners liable.

The policy underlying CERCLA, obtaining voluntary cleanup, does not authorize the Court to alter the language of the statute. By expanding the meaning of owner "at the time of disposal" to "all prior owners after the disposal," the Fourth Circuit has rewritten CERCLA, § 9607(a)(2).

III. THE FOURTH CIRCUIT'S DEFINITION OF DISPOSAL IN WASTE INDUSTRIES IS NOT THE CONTROLLING LAW IN THE PRESENT CASE

In this case, the Fourth Circuit cited United States v. Waste Industries, Inc., 734 F.2d 159 (4th Cir. 1984) as precedent for its interpretation of "disposal." The Fourth Circuit then applied the term "disposal" to CERCLA, § 9607(a)(2). The wording contained in CERCLA, § 9607(a)(2), and applicable to this case, is not, however, "disposal" but

owner or operator "at the time of disposal."

In Waste Industries, the Fourth Circuit interpreted the term "disposal" as it appears in RCRA, 42 U.S.C.A. § 6903(3). In that case, the Fourth Circuit concluded that some of the words in the definition were of an active voice and others were of a passive voice. The Court concluded that disposal had a range of meanings including not only active conduct but also the reposing of hazardous waste and its subsequent movement through the environment.

Waste Industries was not a CERCLA action and addressed a different factual and legal context than the one presented here. In Waste Industries, the Court considered whether, in 1979, the Environmental Protection Agency ("EPA") had authority under RCRA to require remedia-

tion by former owners or operators of an inactive landfill. The Fourth Circuit ruled that RCRA

> Section 7003 . . . is designed to deal with situations in which the regulatory schemes break down or have been circumvented.
>
> . . . .
>
> . . . Congress expressly intended that this and other language [RCRA § 7003] close loopholes in environmental protection.

Id. at 164-165. Applying the law as it was prior to the enactment of CERCLA, it appears that the only way for the Waste Industries Court to preserve the EPA's ability to demand cleanup by former owners was to define "disposal" in RCRA to cover completely passive repose or movement through the environment.

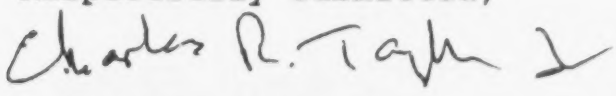
In contrast, the language contained in CERCLA and the language applicable to this case is "at the time of disposal."

The Fourth Circuit failed to mention this language in its opinion. The additional phrase "at the time of" qualifies and modifies the meaning of "disposal." The Fourth Circuit's disregard of this phrase effectively rewrites CERCLA to impose liability on all prior owners.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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August 27, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 91-1775

NURAD, INCORPORATED,
Plaintiff-Appellant,
v.
WILLIAM E. HOOPER & SONS COMPANY; James E. Hooper, Jr.; Kenneth B. Mumaw; All States Moving & Storage; Raymond McMillan; Lawrence L. Hooper; Universal Laboratory Installations, Incorporated; Monumental Millwork, Incorporated,
Defendants-Appellees,
and
FRANK S. NICOLL, JR.; Shareholders of Monumental Enterprises, Incorporated; Sudler Moving & Storage, Incorporated, Defendants,
v.
J. LANGRALL & SONS; Zemco Corporation; Chesapeake Envelope & Print Company; Les Care Laminates,
Third Party Defendants.

No. 91-1790

NURAD, INCORPORATED,
Plaintiff-Appellee,
v.
WILLIAM E. HOOPER & SONS COMPANY, Defendant-Appellant,

and
JAMES E. HOOPER, JR.; Frank S. Nicoll, Jr.; Shareholders of Monumental Enterprises, Incorporated; Kenneth B. Mumaw; All States Moving & Storage; Raymond McMillan; Lawrence L. Hooper; Universal Laboratory Installations, Incorporated; Monumental Millwork, Incorporated; Sudler Moving & Storage, Incorporated, Defendants,

v.

J. LANGRALL & SONS; Zemco Corporation; Chesapeake Envelope & Print Company; Les Care Laminates, Third Party Defendants.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-90-661-WN)

Argued: March 4, 1992

Decided: May 29, 1992

Before WILKINSON, Circuit Judge, WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Wilkinson wrote the opinion, in which

Judge Williams and Senior Judge MacKenzie joined.

COUNSEL

ARGUED: Gina Monath Zawitoski, PIPER & MARBURY, Baltimore, Maryland, for Appellant. Mark Herbert Kolman, ANDERSON, KILL, OLICK & OSHINSKY, Washington, D.C.; Pamela Joyce White, George Whitthorne Kelly, OBER, KALER, GRIMES & SHRIVER, Baltimore, Maryland; Samuel A. Bleicher, MILES & STOCKBRIDGE, Washington, D.C.; Robert John Carson, SMITH, SOMERVILLE & CASE, Baltimore, Maryland; Howard Kenneth Kurman, OFFIT & OFFIT, P.A., Lutherville, Maryland, for Appellees.

ON BRIEF: Deborah E. Jennings, William W. Toole, PIPER & MARBURY, Baltimore, Maryland, for Appellant. Marian Hwang, MILES & STOCKBRIDGE, Baltimore, Maryland; Charles R. Taylor, Jr., GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER, Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Circuit Judge:

This is a suit brought by the current owner of a piece of property for reimbursement of costs it incurred in removing from the property some underground storage tanks and their

hazardous contents. The current owner sought reimbursement from previous owners and tenants at the site, claiming that they were liable under the Comprehensive Environmental Response, Compensation, and Liability Act. (CERCLA) as "owners" or "operators" of the facility at the time of "disposal" of the hazardous substances. 42 U.S.C. § 9607(a)(2). The district court entered summary judgment against the original owner of the tanks and in favor of the other defendants.

We think the district court was correct both in holding that the original owner was liable under CERCLA and in holding that the tenant defendants were not liable as "operators" of the facility in question. We think it erred, however, in absolving certain of the previous owner defendants on the ground that they were not owners "at the time of disposal." By

requiring proof of affirmative participation in hazardous waste disposal as a prerequisite to liability under § 9607(a)(2); the district court misconstrued both the statutory definition of "disposal" and a decision of this court interpreting that definition. We think the statute plainly imposes liability on a party who owns a facility at the time hazardous waste leaks from an underground storage tank on the premises. Any other result would substantially undermine CERCLA's goal of encouraging voluntary cleanup on the part of those in a position to do so.

I.

Plaintiff Nurad, Inc., brought this lawsuit to recover the costs it incurred in removing several underground storage tanks (USTs) from a piece of property it

owns in Baltimore, Maryland. From 1905 to 1963, Wm. E. Hooper & Sons, Co. (the Hooper Co. or the Company) owned the site and adjacent properties, collectively known as Hooperwood Mills. At some point before 1935, the Hooper Co. began to install tanks for the storage of mineral spirits which it used to coat fabrics in its textile finishing plant. The Company continued to use the tanks for that purpose until 1962, when it shut down its finishing operations. At that time, the Hooper Co. abandoned the USTs and did not remove the mineral spirits.

In 1963, the Hooper Co. sold Hooperwood Mills to Property Investors, Inc. Frank Nicoll, as president and principal shareholder of Property Investors and its successor, Monumental Enterprises, Inc., leased several of the buildings on Hooperwood Mills to various

tenants, none of which ever used the USTs. Then in 1976, Monumental Enterprises sold Hooperwood Mills to Kenneth Mumaw, who subdivided the property and sold a portion of it to Nurad.

Nurad's operations at the site involve the manufacture of antennae. In all its years at the site, Nurad apparently never used the USTs. In 1987, however, the Maryland Department of the Environment informed Nurad that the tanks had not been properly abandoned and required that they be removed from the ground or filled with sand or concrete within 180 days. Nurad sought assistance with the cleanup from several of the previous owners and tenants of the site, but they all refused. Nurad then hired an environmental consultant and a tank removal contractor to analyze the contents

of the tanks and dispose of several of the tanks and the surrounding soil.

In 1990, Nurad filed this CERCLA suit, seeking reimbursement for approximately $226,000 in cleanup costs from former owners of the site (the Hooper Co., Nicoll, Mumaw, and Monumental Enterprises); from former tenants at the site (Allstates Moving & Storage, Raymond B. McMillan, Universal Laboratory Installations, Inc., and Monumental Millwork); and from James Hooper, Jr., and Lawrence Hooper (the Hooper brothers), who were shareholders and directors of the Hooper Co. The district court decided the issues of liability on summary judgment. In its view, only the Hooper Co. was liable under CERCLA for costs incurred by Nurad in removing the tanks. The court found that the tenant defendants did not qualify as "operators" because they did

not possess sufficient authority to control the hazardous waste at the facility. Further, the court ruled that certain of the previous owners were not liable because they were not owners "at the time of disposal." According to the district court, "disposal" necessarily contemplated some element of affirmative participation on the part of the defendant, and only the original owner actively dealt with hazardous substances at the site. Accordingly, the court granted summary judgment against the Hooper Co. and in favor of the other defendants. The court also granted Nurad's motion to bifurcate the issues of liability and damages, and entered final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Both Nurad and the Hooper Co. appeal.[1]

II.

Congress enacted CERCLA to address the increasing environmental and health problems associated with inactive hazardous waste sites. The statute encourages private cleanup of such hazards by providing a cause of action for the recovery of costs incurred in responding to a "release" of hazardous substances at any "facility." 42 U.S.C. § 9607; H.Rep.

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[1]Nurad appeals from the district court's order granting the motions for summary judgment filed by the Hooper brothers, Kenneth Mumaw, Allstates Moving & Storage, Raymond McMillan, Universal Laboratory Installations, Inc., and Monumental Millwork. Frank Nicoll did not move for summary judgment, and is not a party to this appeal. The Hooper Co. appeals from the district court's order denying its motion for summary judgment and granting Nurad's motion as against the Company.

No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.C.C.A.N. 6119, 6120. Under CERCLA, a person who incurs such cleanup costs is entitled to recover from anyone who qualifies as a "responsible person" under the statute. 42 U.S.C. § 9607. Responsible persons include the current "owner" or "operator" of the facility, id. § 9607(a)(1), any person who "owned" or "operated" the facility at the time of "disposal" of a hazardous substance, id. § 9607(a)(2), any person who "arranged for disposal or treatment" of hazardous substances at the facility, id. § 9607(a)(3), and any person who accepts hazardous substances "for transport to disposal or treatment facilities, incineration vessels or sites," id. § 9607(a)(4). Any of these responsible persons is strictly liable for costs incurred in responding to the

release of a hazardous substance at the facility. United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), "subject only to the defenses set forth in subsection (b)." 42 U.S.C. § 9607(a). The court has the authority to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Id. § 9613(f)(1).[2]

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[2]The statute also provides that costs will be recoverable only if they are "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The district court in this case granted Nurad's motion to resolve the issues of necessity of the costs and consistency with the national contingency plan at the damages phase. The court's decision to bifurcate was based on its view that the record on these issues was incomplete. Under the circumstances, the decision to bifurcate was well within the court's discretion. See County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1513 (10th Cir. 1991), and cases cited therein.

Here the district court found that Nurad's costs were in response to a release or threatened release of a hazardous substance under CERCLA. The issues on appeal concern the scope of the terms defining responsible persons under § 9607(a)(2)--specifically, the meaning of the terms "owned," "operated," "facility," and "disposal." We think it best to approach the meaning of those terms by considering Nurad's claims against the various parties who were prior owners or tenants at Hooperwood Mills.

A.

We shall first address Nurad's claims against the former tenants at the site. The district court dismissed Nurad's claims against the tenant defendants on the grounds that they lacked the authority to control the USTs and therefore did not "operate[]" a "facility" under §

9607(a)(2). Nurad raises three objections to this aspect of the district court's ruling. First, Nurad contends that the district court applied the wrong legal standard in interpreting the word "operator." In Nurad's view, the court too narrowly defined that term to include only those persons who actually exercised control over the facility.

We do not agree with Nurad that the district court applied an improper standard. The district court applied the correct standard in holding that the tenant defendants need not have exercised actual control in order to qualify as operators under § 9607(a)(2), so long as the authority to control the facility was present. Although the court did note that the tenant defendants "never actively participated in the disposal of hazardous substances" at the site, the court's

decision quite properly turned on the fact that they lacked "authority to control the operations or decisions involving the disposal of hazardous substances at the Site or the contents of the USTs" (emphasis added). Indeed, the district court's examination of the terms of the various leases in question indicated that it recognized that authority to control--not actual control--was the appropriate standard. This is the definition of the word "operator" that most courts have adopted, see, e.g., CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 788 (W.D.Mich. 1989); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D.Idaho 1986), and it is one which properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to

actually exercise that authority by undertaking efforts at a cleanup. Under this standard, the district court was entitled to consider a defendant's actual conduct as evidence of the authority to control, see, e.g. Riverside Market Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir. 1991); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985), but it clearly did not inflate that item of evidentiary significance into a dispositive legal requirement.

Second, Nurad objects to the district court's interpretation of the word "facility." Liability under § 9607(a)(2) extends to any person who "operated any facility" at which hazardous substances were disposed of, and the district court proceeded on the premise that the "facility" in this case was confined to

the USTs.[3] Nurad contends that the "facility" at issue here encompassed the entire Nurad site, so that the proper inquiry is whether the tenant defendants had control over any portion of that site, not just the storage tanks.

We disagree. CERCLA defines "facility" to include a "building, structure, ... storage container" or other "area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). In this case, the only "area" where hazardous substances have "come to be located" is in and around the

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[3]The district court purported to sidestep the issue of whether to define the "facility" to encompass the entire Nurad property, but its analysis reveals that it considered the facility to be limited to the USTs. In concluding that the tenant defendants did not "operate" the "facility," for example, the court reasoned that they "lacked the requisite degree of control over the USTs."

storage tanks, so the relevant "facility" is properly confined to that area. To be sure, the tanks are a part of the larger piece of property that is now the Nurad site. During the relevant period, however, the site was subdivided and separate portions of it were leased out to individual tenants. The fact that those tenants may have had control over a building that was adjacent to the USTs is irrelevant under the statute; a defendant operates a "facility" only if it has authority to control the area where the hazardous substances were located. Thus, while liability under § 9607(a)(2) is strict, Monsanto, 858 F.2d at 168, it nonetheless extends only to those who have authority over the area where hazardous substances are stored. The statute places accountability in the hands of those capable of abating further environmental

harm, while Nurad's proposed definition of "facility" would rope in parties who were powerless to act.

Finally, Nurad contends that even if the court applied the correct legal standard, it erred in its factual determination that the tenant defendants lacked the authority to control the USTs. Nurad contends that as lessees the tenants had a property interest that necessarily included the implicit authority to control the portion of the site that contained the USTs. We agree with the district court, however, that the terms of the tenants' lease agreements conclusively establish that their authority as tenants did not extend to the USTs. Defendant Allstates Moving & Storage, for example, leased parts of several buildings on the Nurad site to conduct its freight transfer and storage operations from 1966 to 1979, but

Allstates' lease agreements never conferred upon it any authority over the USTs, which were under the active management of the landlord. The initial lease demised to Allstates the "1st floor of Building 4C," and limited it to use "as an office and warehouse for the storage of furniture[,] appliances, and other such equipment and material consistent with the business of the tenant." In addition, the lease demised to Allstates use of the following common areas: the lavatory marked I and the parking area marked II and ... the railsiding in the said complex to spot boxcars plus the ... driveways to the siding in order to load and unload goods stored in the demised premises. Subsequent lease agreements denised to Allstates portions of other buildings on the site, but none expanded its authority to use any common areas other than those

specifically identified in the initial agreement, and none purported to give Allstates authority to use the areas where the tanks were situated.

The other tenant defendants also lacked authority to control the USTs. Universal Laboratory Installations, Inc., occupied portions of two of the buildings at Hooperwood Mills under an oral lease for nine months during 1972. Universal used the buildings as an office and storage facility for its cabinet installation business. Under Universal's oral agreement, it had the right to occupy specific portions of the two buildings, rights of ingress and egress to those buildings, and the right to use the loading dock. Monumental Millwork leased a portion of one of the buildings at the site from 1969 to 1978 for use as an office and for the assembly and storage of

doors and windows. Nurad makes broad assertions about both Universal's and Millwork's authority over the Nurad site, but has adduced no evidence sufficient to contradict the trial court's conclusion that they had no authority to control the USTs or their contents.

Given the precise language of the lease agreements and the absence of any express authority to use the USTs, we think it would be unreasonable to assume that the tenant defendants possessed any implicit authority to exercise control over the tanks. Indeed, Nurad's suggestion that these tenants had some de facto authority over the USTs is inconsistent with the landlord's actual practice, which required a separate lease agreement when in 1966 the Hooper Co., then a tenant, sought to use one of the tanks. Under the circumstances, the

tenant defendants may even have been trespassing if they had attempted to assume the role of "operator" of the USTs. We thus agree with the district court that each of the tenant defendants--Allstates Moving & Storage, Universal Laboratory Installations, and Monumental Millwork--was entitled to summary judgment. Since Nurad's only allegations against McMillan were that he was president and sole shareholder of Allstates, our holding requires that McMillan be granted summary judgment also.

B.

Next we address Nurad's claims against James and Lawrence Hooper. Nurad contends that the district court erred in finding that the Hooper brothers did not qualify as operators. Even if we assume that a corporate officer may be held personally liable as an operator, see

Shore Realty, 759 F.2d at 1052, we agree with the district court that the Hooper brothers lacked the requisite authority to control the USTs or to prevent the disposal of hazardous waste at the site. It is true that the Hooper brothers were vice presidents of the Hooper Co. beginning in the early 1960s. Any authority they possessed was entirely subordinate to that of their father, however, who as president and majority stockholder exercised ultimate authority over the finishing plant. The senior Hooper was not anxious to cede this authority to his sons; an uncontradicted affidavit described him as "a man of strong will and temperament suited to running the entire affairs of the corporation, which he did." Nurad has failed to direct our attention to any evidence that would undermine the district

court's conclusion that "James Hooper, Sr., as president during the relevant times, retained all decision-making authority over the company including the daily operations at the finishing plant," and that the younger Hoopers should accordingly not face CERCLA liability.[4]

C.

Finally, we address Nurad's claims against the previous owners of the site,

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[4]Nurad insists that the district court failed to give proper weight to the fact that the Hooper Co. resumed its finishing operations as a tenant in 1966 in two buildings that the Company leased from Property Investors. Nurad suggests that during that period the Hooper brothers controlled the underground tank then in use, denominated the "building 28 tank." The district court found, however, that Mr. Hooper, Sr., was at that time still in a position to exercise absolute control over the Company. Moreover, Nurad has conceded that the building 28 tank is not on the Nurad site and is not a subject of this suit, so that the Hooper brothers' control of that tank cannot affect their status as operators of the facility in question.

the Hooper Co. and Kenneth Mumaw. Neither the Hooper Co. nor Mumaw appeals from the district court's conclusion that they are prior owners of the facility. At oral argument, Mumaw did direct our attention to the fact that he held legal title to the property for only a short period of time. We do not think, however, that the work "owned" is a word that admits of varying degrees. Such equitable considerations as the duration of ownership may well be relevant at a later stage of the proceedings when the district court allocates response costs among liable parties, see 42 U.S.C. § 9613(f)(1), but we reject any suggestion that a short-term owner is somehow not an owner for purposes of § 9607(a)(2).

Because both the Hooper Co. and Mumaw are prior owners of the facility, we must ask whether recovery against them is

nonetheless barred because no "disposal" of hazardous wastes took place on their watch. The district court took a narrow view of the word "disposal," limiting it to disposal by affirmative human conduct. Thus, the court concluded that the Hooper Co. was liable because it actively disposed of hazardous substances and then abandoned them in the USTs. The court held, however, that Mumaw was not liable--even though passive migration of hazardous substances may have occurred during his ownership--since he did not take an active role in managing the tanks or their contents.

We think the district court's restrictive construction of "disposal" ignores the language of the statute, contradicts clear circuit precedent, and frustrates the fundamental purposes of CERCLA. The statute defines "disposal" in

42 U.S.C. § 9601(29) by incorporating by reference the definition found in the Resource Conservation and Recovery Act (RCRA). That definition states: The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C. § 6903(3). Some of the words in this definition appear to be primarily of an active voice. See Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (N.D.Cal. 1989). This is true of "deposit," "injection," "dumping," and "placing." Others of the words, however, readily admit to a passive component: hazardous waste may leak or spill without

any active human participation. The district court arbitrarily deprived these words of their passive element by imposing a requirement of active participation as a prerequisite to liability.

Indeed, this circuit has already rejected the "strained reading" of disposal which would limit its meaning to "active human conduct." United States v. Waste Ind., Inc., 734 F.2d 159, 164-65 (4th Cir. 1984). In Waste Industries, the court held that Congress intended the 42 U.S.C. § 6903(3) definition of disposal "to have a range of meanings," including not only active conduct, but also the reposing of hazardous waste and its subsequent movement through the environment. Id. at 164. Here the district court attempted to distinguish Waste Industries on the ground that it involved the authority of the

Environmental Protection Agency to demand cleanup by former owners and operators under RCRA. The district court thought that the Waste Industries definition was necessary to close a loophole in RCRA's environmental protection scheme, see id. at 165, and believed "that the only way for the Waste Industries court to preserve the EPA's ability to demand cleanup by the actual former owners and operators was to define 'disposal' in RCRA to cover completely passive repose or movement through the environment." In this CERCLA action, by contrast, the district court noted that the current owner and all prior owners were already defendants and in some cases were liable for cleanup costs.

We think the district court was bound to follow Waste Industries in interpreting the term "disposal." It is true that Waste Industries interpreted the

definition in the context of RCRA, but Congress expressly provided that under CERCLA the term "shall have the meaning provided in section 1004" of RCRA (42 U.S.C. § 6903(3)). 42 U.S.C. § 9601(29). Moreover, the aim of both RCRA and CERCLA is to encourage the cleanup of hazardous waste conditions. Whether the context is one of prospective enforcement of hazardous waste removal under RCRA or an action for reimbursement of response costs under CERCLA, a requirement conditioning liability upon affirmative human participation in contamination equally frustrates the statutory purpose.

It is easy to see how the district court's requirement of active participation would frustrate the statutory policy of encouraging "voluntary private action to remedy environmental hazards," In re Dant & Russell, Inc., 951

F.2d 246, 248 (9th Cir. 1991). Under the district court's view, an owner could avoid liability simply by standing idle while an environmental hazard festers on his property. Such an owner could insulate himself from liability by virtue of his passivity, so long as he transfers the property before any response costs are incurred. A more conscientious owner who undertakes the task of cleaning up the environmental hazard would, on the other hand, be liable as the current owner of the facility, since "disposal" is not a part of the current owner liability scheme under 42 U.S.C. § 9607(a)(1). See Shore Realty, 759 F.2d at 1044. The district court's view thus introduces the anomalous situation where a current owner, such as Nurad, who never used the storage tanks could bear a substantial share of the cleanup costs, while a former owner who

was similarly situated would face no liability at all. A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.

The district court's view of the CERCLA definition of disposal is also at odds with CERCLA's strict liability emphasis. The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination. See Monsanto, 858 F.2d at 168 ("The traditional elements of tort culpability on which the site-owners rely simply are absent from the statute."); Shore Realty, 759 F.2d at 1044 (noting that Congress specifically rejected a causation requirement). We must decline therefore to engraft onto the statute

additional prerequisites to the reimbursement of response costs which Congress did not place there.

Thus, we hold that § 9607(a)(2) imposes liability not only for active involvement in the "dumping" or "placing" of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was "spilling" or "leaking." The only remaining question is whether a statutory disposal of hazardous waste occurred during the period of Hooper's and Mumaw's ownership.

We think for the following reasons that it did. Initially, the record supports the conclusion that both the Hooper Co. and Mumaw owned the facility at a time when the mineral spirits were "leaking" from the tanks. Nurad has established that the Hooper Co. began to install the USTs some time before 1935 and

that mineral spirits reposed in the tanks until they were removed by Nurad in 1988-89. Nurad has further presented uncontroverted evidence that at the time the tanks were removed the soil around several of the tanks was contaminated with mineral spirits. Indeed, the district court found that the "mineral spirits in the excavated soil show an exact chromatographic match" with those in one tank, and that another of the tanks had "corrosion holes in the bottom and was underlain by discolored soils that emanated solvent odors." Neither the Hooper Co. nor Mumaw has pointed to anything to overcome the presumption that the leaking that has occurred was not a sudden event, but the result of a gradual and progressive course of environmental contamination that included these defendants' period of ownership. We do

not think in such circumstances that Congress intended to impose upon a CERCLA plaintiff the onerous burden of pinpointing at what precise point a leakage may have begun. This circuit has been careful not to vitiate what was intended as remedial legislation by erecting barrier upon barrier on the road to reimbursement of response costs. As this court emphasized in rejecting a requirement that a CERCLA plaintiff prove a nexus between waste sent by a particular defendant to a particular site and the resulting environmental harm: Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source..."To require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute." Monsanto, 858

F.2d at 170 (quoting United States v. Wade, 577 F. Supp. 1326, 1332 (E.D.Pa. 1983)).

Finally, we agree with the district court that the Hooper Co.'s claim that there was no statutory disposal is especially insubstantial. The Company disposed of hazardous substances at the site by depositing them in the USTs and abandoning them upon closing its finishing plant in 1962. The statute provides that "disposal" includes the "placing" of any hazardous waste "into or on any land" so that such hazardous waste "may enter the environment," 42 U.S.C. § 6903(3), and courts have specifically held that depositing hazardous waste into enclosed containers fits this definition. See, e.g., Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1278 (W.D.N.Y. 1990),

aff'd, No. 91-9157, --- F.2d --- (2d Cir. March 11, 1992). Even if we accept the Hooper Co.'s argument that the storage of useful mineral spirits for active use as a raw material cannot constitute disposal because it is not "waste," see 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1362 (9th Cir. 1990), we think there clearly was a disposal in 1962 when the Company closed down the finishing plant and abandoned the tanks. At that point, the mineral spirits clearly became "waste," as they were abandoned and were apparently never again used. See 40 C.F.R. § 261.2 (defining waste as any "discarded" material, or material which has been "abandoned").

The Hooper Co. is quick to point out that it later "sold" the USTs and their contents to Property Investors, but we agree with the district court that the

sale of the previously abandoned tanks to a real estate investor--who had no use for the mineral spirits or the tanks and apparently never used them--cannot reverse the earlier disposal. A defendant who has abandoned hazardous materials at a site cannot escape CERCLA liability by simply labelling a subsequent transfer of the property as a "sale" of the hazardous waste. See United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1381 (8th Cir. 1989) ("[C]ourts have imposed CERCLA liability where defendants sought to characterize their arrangement with another party who disposed of their hazardous substances as a 'sale' rather than a 'disposal.'")

III.

In sum, Nurad is entitled to reimbursement from some of the prior occupants of Hooperwood Mills, but not

from all. We affirm the district court's dismissal of Nurad's claims against each of the tenant defendants and against the Hooper brothers, and we affirm the entry of summary judgment in Nurad's favor against the Hooper Co. We reverse the district court's denial of Nurad's motion for summary judgment as to Mumaw. We remand the case for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

NURAD, INC.	*	
v.	*	CIVIL ACTION NO. WN 90-661
WM. E. HOOPER & SONS CO. et al.	*	
	*	

* * * * * * * * *

MEMORANDUM

Plaintiff Nurad, Inc. ("Nurad") initiated this action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607,[5] to

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[5]This section provides, in pertinent part:

> [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
>
> (continued...)

recover costs incurred and to be incurred responding to alleged releases and the threat of release from seven Underground Storage Tanks at property currently owned by Nurad. Named as defendants in this action are the prior owners of the property and others associated with the site.

Plaintiff has filed two motions for partial summary judgment and a declaration that defendants are jointly and severally liable for Nurad's response costs consistent with the National Contingency Plan ("NCP"). Nurad's first motion is directed at defendants Wm. E. Hooper & Sons Co. (the "Hooper Co." or "Hooper"),

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[5](...continued)

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9607(a)(2)(B).

James E. Hooper, Jr., Allstates Moving and Storage ("Allstates"), Kenneth B. Mumaw, Raymond B. McMillan, and Frank S. Nicholl, Jr.[6] Nurad has also moved for partial summary judgment against defendants Lawrence L. Hooper, Universal Laboratory Installations, Inc. ("Universal") and Monumental Millwork, Inc. ("Monumental Millwork").[7] Defendants oppose these motions.[8] Several defendants, including the Hooper Co., James and Lawrence Hooper, Allstates, Mr. McMillan, Mr. Mumaw, Monumental Millwork and Universal have filed cross-motions for summary judgment

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[6]Paper Nos. 96, 158

[7]Paper No. 145.

[8]See Paper Nos. 110, 111, 114, 146, 148, 150, 151, 159.

against Nurad.[9] Plaintiff has filed oppositions to these motions.[10]

The Court heard oral argument on all summary judgment motions on March 1, 1991. After hearing arguments and reviewing the pleadings and supporting papers, the Court will rule as set forth below.[11]

BACKGROUND

The following is a summary of the important background facts; other facts will be discussed in the context of the liability issues.

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[9]Paper Nos. 93, 97, 102, 118, 123, 137, 139, 154.

[10]See Paper Nos. 108, 109, 127, 142, 147, 157.

[11]There are three other pending motions: 1) Zemco Corporation's ("Zemco") Motion for Summary Judgment (Paper No. 113); 2) Nurad's Motion for Bifurcation (Paper No. 94); and 3) James E. Hooper Jr.'s Motion to Dismiss (Paper No. 133). All of these motions are ripe and will be ruled on at this time.

This case arises out of the existence of seven Underground Storage Tanks ("USTs") located at the northwest corner of 2165 Druid Park Drive in Baltimore, Maryland (the "Nurad site" or the "Site") where Nurad currently owns and operates an antenna manufacturing facility. The Site also encompasses a connected group of buildings designated as Buildings 4, 4A, 4B, 4C, 24, and 24A.[12] According to Nurad, the USTs were installed by the Hooper Co. which owned the Site and the surrounding properties (the "Hooperwood Mills" or the "Mill") from 1905 until November 30, 1963. Before its sale in 1963, the Hooper Co. ran a textile manufacturing operation at the Mill and

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[12]For a map of the Site, see Exhibit H to Appendix of Exhibits to Nurad's Memorandum in Support of Motion for Partial Summary Judgment and Declaration of Liability (hereinafter "Nurad Exhibit __").

conducted finishing operations at Building 4 which involved the flameproofing and waterproofing of canvas. Nurad alleges that during these operations, the Hooper Co. used certain chemicals and stored them in two of the USTs from as early as 1935 until 1962. Four additional USTs appear on a site map dated April 14, 1945[13] and another UST appears on a site map dated June 1, 1948.[14] The dates of installation, however, are not shown on these maps. A map prepared by Hooper's insurance agent and dated December 3, 1962 depicts the location of each UST and its contents.[15]

In 1963, the Mill, including the Site, was sold to Property Investors, Inc.

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[13]See Nurad Exhibit F.

[14]See Nurad Exhibit G.

[15]See Nurad Exhibit H.

Defendant Frank S. Nicholl was the president and principal shareholder of Property Investors and its successor corporation Monumental Enterprises during the relevant times. In 1966, the Hooper Co. leased from Property Investors Buildings 24 and 24A on the Site to conduct a small finishing operation there. On August 9, 1976, Monumental Enterprises sold Hooperwood Mills, including the Site, to Kenneth B. Mumaw who subdivided it into three parcels and sold the Site or Parcel "C" to Nurad, Parcel "B" to the Hooper Co. and Parcel "A" to Chesapeake T.V. See Nurad Exhibit U. Parcel "B" consists of Buildings 2, 2A and 28 and associated property, and is adjacent to the Nurad site. Before purchasing Parcel "C" or the Site, Nurad occupied as a tenant all or a part of the second floor of Buildings 4,

4B and 4C. In 1988, the Hooper Co. sold Parcel "B" to Kenneth Mumaw.

In the Fall of 1988, Nurad learned that at least one of the USTs contained hazardous substances. On December 16 and 19, 1988, Nurad hired Geraghty and Miller ("G&M") and Chem Clear to perform historical research of the Site, identify and analyze the contents of the tanks, conduct tank closures, cleaning and sealing. Nurad alleges that it has incurred response costs of approximately $277,680.77 relating to these activities but claims that it has not developed a permanent remedy for the Site. Plaintiff presently seeks a declaration that defendants are jointly and severally liable for these costs and any future costs to be incurred by Nurad consistent with the NCP. At this time, Nurad does not ask for a determination of the amount

of recoverable costs (i.e., the necessity of the response costs and their consistency with the NCP).

DISCUSSION

I. Plaintiff's Motions for Partial Summary Judgment and Defendants' Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] [t]he moving party is 'entitled to judgment as a matter of law.'" Id. at 323. (citations omitted).

If the evidence favoring the non-moving party is "merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986) (citations omitted). Unsupported speculation is insufficient to defeat a motion for summary judgment. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (citing Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12

(4th Cir. 1986)). Moreover, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. Anderson, 477 U.S. at 247-48. Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." Id.

Finally, in assessing such a motion, the Court must view the evidence and all justifiable inferences in the light most favorable to the party opposing the motion. United States v. Diebold. Inc., 369 U.S. 654, 655 (1962) (per curiam).

B. CERCLA Section 107(a)

In order to grant partial summary judgment on the issue of defendants'

liability under Section 107, Nurad must prove the following four elements:[16]

> (1) the site is a "facility";
>
> (2) a "release" or a "threatened release" of any "hazardous substance" from the facility has occurred;
>
> (3) the release or threatened release has caused plaintiff to incur "response costs"; and
>
> (4) the defendant is a person who owned or operated the facility when a hazardous substance was disposed of.

United States v. Conservation Chem. Co., 619 F. Supp. 162, 184 (W.D. Mo. 1985); Southland Corp. v. Ashland Oil. Inc., 696 F. Supp. 994, 999 (D. N.J. 1988). Absent the demonstrated presence of an affirmative defense listed in 42 U.S.C. § 9706(b)(1)-(3), and upon proof of the

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[16]Several defendants contend that Nurad must also prove that its response costs are consistent with the NCP to establish liability, That argument will, be addressed infra at 49 during the Court's discussion of Nurad's motion to bifurcate.

above elements, CERCLA imposes strict, joint and several liability upon the offending party. United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO"), 810 F.2d 726, 732 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

With these principles in mind, the Court will review the arguments presented by the parties.

1. Facility

CERCLA defines "facility" as, among other things, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." 42 U.S.C. § 9601(9)(B). This definition has been broadly interpreted and includes almost every place where a hazardous substance could ultimately become located. See,

e.g., Dedham Water Co. v. Cumberland Farms Dairy Inc., 889 F.2d 1146 (1st Cir. 1989); United States v. NEPACCO, 810 F.2d 726; United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985); New York v. General Electric Co., 592 F. Supp. 291, 296 (N.D.N.Y. 1984).

"Hazardous substance" is defined in Section 101(14), CERCLA, 42 U.S.C. § 9601(14) and includes, inter alia, any substance specifically listed by the Environmental Protection Agency ("EPA") as a hazardous waste under Section 3001 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921. In addition to the listed hazardous wastes, other substances are hazardous under CERCLA if they exhibit any of the hazardous characteristics identified by RCRA: EP toxicity, corrosivity, reactivity, and

ignitability. See 42 U.S.C. § 9601(14)(C), 40 C.F.R. § 261.20 et seq.

Nurad argues that the Site is a "facility" as defined by CERCLA because laboratory analyses of tank contents confirm that mineral spirits-based solvents (e.g., Xylol, Solvesso, Amsco) and methyl isobutyl ketone ("MIBK") are or were in several of the tanks on Nurad's property.[17] Nurad also points out that

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[17]During their investigation of the Site, Chem Clear and G&M identified the location and contents of the seven USTs. Nurad Tank 1 was located to the west of Buildings 4, contained fuel oil and was removed on December 21, 1988. Nurad Tanks 3, 4, and 7 were addressed together because of their close proximity. Tank 3 contained 40 gallons of substance containing 90% MIBK and the contents were removed on January 18, 1989. Tank 4 contained approximately one inch of sludge overlain with water. Tank 7 is described to have contained 1200 gallons of water and 1% MIBK and the contents were removed on January 31, 1989. These tanks were then cleaned and sealed in place.

(continued...)

both substances are present in the soils around the tanks and loading dock at the Site.[18] Because MIBK and mineral spirits

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[17](...continued)
The undisputed results of the analyses of the tanks' contents are summarized below:

TANK NO.	LAST KNOWN CONTENTS (1962) 1989 CONTENTS
1	Fuel OilWeathered Fuel Oil
2	(determined to be a former aboveground tank)
3	MIBKMIBK (90%)
4 (Liquid)	Mineral SpiritsMineral Spirits in Water
4 (Sludge)	Mineral Spirits Petroleum Hydrocarbons
5	Mineral Spirits Water
6	Mineral Spirits Water
7	MIBK MIBK and Mineral Spirits in Water

See Nurad Exhibit A at 37, 61, 62, 70, 71.

[18]See Nurad Exhibit A at 13-14, 18 and Nurad Exhibit B.

are hazardous wastes under RCRA,[19] Nurad argues that they are also hazardous substances under Section 101(14) of CERCLA. 42 U.S.C. § 9601(14).

None of the defendants dispute that hazardous substances have come to be located on Nurad's property. Given the past and current presence of these substances at the Site, the Court finds that the Nurad property, 2165 Druid Park Drive, is a "facility" within the meaning of CERCLA.[20]

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[19]Nurad asserts that mineral spirits is a hazardous waste because it has a flash point of less than 60°C (140°F) and is ignitable. See Nurad Exhibit C; 40 C.F.R. § 261.21.

[20]In arguing that they are not operators, the tenant defendants (Allstates, Universal and Monumental Millwork) suggest that the Court should define the "facility" as only those areas of the Nurad parcel which actually contain hazardous substances. The Court need not address this argument, however, since the Court concludes that these

(continued...)

2. Release or Threatened Release

Nurad must also demonstrate there has been a release or a threatened release of hazardous substances from the Site. CERCLA defines "release" to include any of the following:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . .

42 U.S.C. § 9601(22). The term "environment" refers to "surface water, groundwater, drinking water supply, land surface or subsurface strata, or ambient air." 42 U.S.C. § 9601(8).

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[20](...continued)
defendants are not operators of the "facility" even when defined to include the entire Nurad parcel. See infra at 30-37.

This definition has also been broadly construed. A release occurs, for example, when asbestos fibers are blown from one site by the wind, United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1149 (D. Ariz. 1984), or when hazardous substances leach into soil and the groundwater, United States v. Wade, 577 F. Supp. 1326, 1334 (E.D. Pa. 1983). Moreover, the release or threatened release "of a or any hazardous substance" is sufficient to establish liability. See United States v. South Carolina Recycling and Disposal, Inc. ("SCRDI"), 653 F. Supp. 984 (D.S.C. 1984), aff'd in part and vacated in part sub nom, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Wade, 577 F. Supp. at 1333 ("the release which results in the incurrence of response costs and liability need only be of "a" hazardous

substance and not necessarily one contained in defendant's waste."). Leaking tanks also constitute "releases" under 42 U.S.C. § 9601(22), Emhart Industries, Inc. v. Duracell Intern. Inc., 665 F. Supp. 549 (M.D. Tenn. 1987), and corroding and deteriorating tanks amount to a threat of release. See New York v. Shore Realty Corp., 759 F.2d at 1045; see also United States v. Medley, 13 Chem. Waste Lit. Rep. 143, 146 (D.S.C. Nov. 4, 1986) ("The emitting or release of volatile organics into the ambient air and the storage of hazardous substances in deteriorating or leaking drums and unlined lagoons . . . clearly constituted a 'release' or 'substantial threat' of release.").

In the present case, the Hooper Co. operated a finishing plant at the Site from the early 1930s until mid-1962.

There is undisputed testimony that Hooper used two USTs to store mineral spirits-based solvents from 1935 to 1962.[21] Although there is no evidence that the other five tanks were used during this time, a site map prepared in 1962 by the Hooperwood Mills' insurance company shows the contents of four of the seven USTs as mineral spirits-based solvents and

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[21] See Appendix, of Exhibits to Nurad's Opposition to the Hooper defendants' Motion for Summary Judgment (hereinafter "Nurad Opposition Exhibit _ ") Exhibit A at 8-14, 67-70 (deposition transcript of Gary W. Pope, Sr.) and Exhibit Y at 23-26 (deposition transcript of Kenneth B. Mumaw).

The parties, however, disagree as to which two tanks were used to store chemicals and/or solvents. Nurad claims that Tanks 6 and 8 were used by Hooper to store solvents and chemicals during the finishing plant operations while Hooper claims that Tank 8 and a tank on a property adjacent to the Site were used. The Court does not find that this disagreement presents a material issue of fact since both parties agree that Tank 8 was used by Hooper during this time and the record supports this finding. Id.; Nurad Exhibit H.

two USTs as containing MIBK. Nurad Exhibit H. Moreover, in a November 1963 Bill of Sale, the Hooper Co. characterized the contents of six of the tanks as "solvents or processing materials." Nurad Opposition Exhibit G. Therefore, by 1988 the two buried USTs at the Site which were used by Hooper at the finishing plant were over 40 years old, and the other tanks were at least 20 years old. In light of these facts, the Court concludes that when Nurad discovered in 1988 that at least one of the USTs contained hazardous substances, there was a threat of release.

The Court further finds that an actual release occurred at the Site. Nurad has presented undisputed evidence that mineral spirits were discovered in the excavated soils in the roll-off containers around the tanks and loading dock at the Site. Nurad Exhibit B. These

mineral spirits in the excavated soil show an exact chromatographic match with the mineral spirits in the liquids found in Tank 4. Nurad Exhibit A at 18. Moreover, Tank 8 was confirmed to have corrosion holes in the bottom and was underlain by discolored soils that emanated solvent odors. Nurad Exhibit A at 10-11. Additionally, soils around the tanks near the loading dock also emitted odors of solvents and fuel oil strong enough to require respiratory protection for workers. Nurad Exhibit A at 13-14.

Based on this uncontroverted evidence, the Court concludes that an actual release occurred. See U.S. v. Hardage, 761 F. Supp. 1501, 1510 (W.D. Okla. 1990) ("[p]resence of hazardous substances in the soil, surface water or ground water of a site demonstrates a release" under CERCLA). Contrary to the

defendants' suggestion, whether the release was in a reportable quantity or whether Nurad notified the state or federal authorities when the alleged release occurred are not relevant to a determination of CERCLA liability. See id. at 1511 ("Liability under CERCLA does not depend upon any particular quantity of the hazardous substance. Even a de minimis contributor can be held liable."); United States v. Wade, 577 F. Supp. at 1339-41. The Court thus finds that Nurad has met its burden of showing that there has been a release or threatened release of hazardous substances from the Site.

3. Response Costs

CERCLA also requires Nurad to demonstrate that the release or threatened release of hazardous substances caused it to incur response costs. 42 U.S.C. § 9607(a)(4). Nurad argues that its

response actions were directly precipitated by its discovery that the USTs contained hazardous substances and its concern that those substances were entering the environment. Nurad alleges that it incurred costs from conducting a "removal" action, i.e., steps taken on an expedited basis to eliminate a continuing release of hazardous substances from these tanks. See 40 C.F.R. § 300.415. Nurad points out that it investigated the age, location and contents of the tanks, then removed several of them and their contents.

The Hooper defendants contend that to satisfy this requirement Nurad must show that Hooper's conduct caused Nurad to incur response costs. Because no causal nexus exists between Hooper's actions and Nurad's response action, according to

Hooper, Nurad cannot demonstrate this element of CERCLA liability.

The Hooper defendants' argument misses the point. As the district court recently explained in United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 544 (N.D.N.Y. 1991):

> all that Section 107(a) requires is that there be a release or threatened release of hazardous substance which causes the incurrence of response costs. . . . [t]here is absolute]y no requirement that plaintiff, demonstrate a causal nexus between the defendant's conduct and the contamination at the property involved. What appears to be required, at most, is that the plaintiff demonstrate some relationship between a release and a response.

See also Dedham Water Co. v. Cumberland Farms Diary Inc., 889 F. 2d at 1154.

In this regard, tne Court notes that a release of hazardous substances occurred and a threat of release of hazardous substances existed in 1988. Nurad

responded to this release and threatened release. Under the statute, therefore, the required nexus has been established.

4. Owners and/or Operators

In addition to the above elements common to any party potentially liable under Section 107 of CERCLA, Nurad must also establish that each party falls within at least one of the four classes of covered persons under CERCLA. Nurad seeks to impose liability upon all defendants under Section 107(a)(2) which provides that any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of is liable for response costs under CERCLA. The present action involves two types of defendants; 1) individuals who owned the Site; and 2) others associated with the

Site. The Court will discuss each category separately below.

a. Defendants in the Chain of Title

1. The Hooper Co.

As discussed previously, the Hooper Co. owned and operated the Site from at least 1905 to November 30, 1963. During this time, the company ran a textile manufacturing operation at the Mill, and from as early as 1926 to 1963 conducted finishing operations at Building 4 utilizing MIBK and mineral spirits. Although there is some dispute over which tanks were actually used during the finishing operations at Building 4,[22] Hooper concedes that it used two USTs to the east of that Building, including Nurad Tank 8, to store mineral spirits-based

[22] See supra n.17.

solvents.[23] Hooper also admits that it used a variety of chemicals and/or solvents including MIBK in its finishing operations.[24] The company purchased MIBK and stored it in 55 gallon drums above-ground in connection with these operations. See Nurad Exhibit E at 37, 131.

In 1962, the Hooper Co. shut down the finishing plant operations and ceased its use of the tanks. Hooper did not remove the tank contents. Rather, in November, 1963, Hooper sold the Mill, including the Site and the tanks, to Property Investors. At the time of the sale, there were seven USTs at the Site. Nurad Opposition

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[23]See Hooper's Memorandum in Opposition to Nurad's Motion for Summary Judgment and for Bifurcation at 4; Hooper's Memorandum of Law in Support of Motion for Summary Judgment at 8.

[24]See id.

Exhibits B, G. Subsequently, in 1966, the company leased two buildings on the Site (Buildings 24 and 24A) and conducted a small finishing operations there. It used the "Building 28 tank" in that operation. See Nurad Exhibit I at 81-85.

Based on these undisputed facts, the Court concludes that the Hooper Co. is a prior owner and operator of the Site.[25]

2. Lawrence L. Hooper and James E. Hooper, Jr.

Nurad also seeks to hold defendants Lawrence L. Hooper and James E. Hooper, Jr. liable as prior owners and operators under CERCLA. Nurad argues that these defendants had the capacity to make a

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[25]The Court will discuss infra at 38-45 Hooper's argument that no "disposal" occurred during its ownership of the Site and, that its transfer of the Site to Property Investors defeats Nurad's argument that it is a prior owner or operator.

timely discovery of the USTs and could have prevented the abandonment of the tanks and the disposal of hazardous substances at the Site during their ownership. Nurad points out that each defendant held stock in the company and that they were remaindermen in a family trust. As former officers and directors of the Hooper Co., according to Nurad, both defendants were in positions to influence company decisions, including the disposition of Hooperwood Mills, the USTs and their contents.

Defendants James and Lawrence Hooper contest their liability under CERCLA. They argue that from 1947 to 1961 as salesmen for Hooper and upon their return in 1963 neither defendant participated in decisions regarding the use of the USTs, nor did either have a controlling stock interest in the company. These defendants

also contend that neither had the general nor specific power to control the operations of the Hooper Co. before or after the sale of the Site in 1963.

The undisputed facts regarding the individual Hooper defendants' association with the Site support the following findings: Both Lawrence L. Hooper and James E. Hooper, Jr. became associated with the Hooper Co. as teenagers, working summers at the Hooperwood Mills. From this exposure, they were aware that the company used solvents to coat fabrics. James, Jr. was aware that the solvent was stored in tanks and drums at the Mill, while Lawrence was aware that the company used chemicals, including MIBK, obtained in 55 gallon drums. See Nurad Opposition Exhibit M at 5-6, 8-9, 14-20, 115-119 (deposition of Lawrence Hooper); Nurad Opposition Exhibit I at 34-35 (deposition

of James Hooper, Jr.). Lawrence Hooper, however, did not know that the company used USTs at the Site.

From 1947 to 1961, the Hooper brothers worked for the company as salesmen outside of Maryland. Nurad Opposition Exhibits M, I. From 1961 to 1963, they left Hooper and began working for Mount Vernon Mills. Upon their return in late 1963, they both became vice presidents of the company. Prior to and during their employment at Mount Vernon Mills, the Hoopers remained on the Hooper Co.'s Board of Directors having been elected on March 29, 1960 and every year thereafter until 1963. Nurad Opposition Exhibits K, L. The Board had six members, three of whom were always James E. Hooper, Sr., James E. Hooper, Jr. and Lawrence L. Hooper. Id.; Nurad Opposition Exhibits M, I.

The Hoopers were also contingent remaindermen beneficiaries of the Robert P. Hooper Trust, administered by their father, James E. Hooper, Sr., as sole trustee from 1958 until his death in 1977. See id. The Trust held a majority of the voting stock of the company. Apart from this interest, each defendant independently owned additional shares of non-voting preferred stock in the company prior to 1963. Id.

From 1958 to April, 1969, James E. Hooper, Sr., their father, was the president of the Hooper Co. The Hooper defendants have submitted an affidavit which indicates that Mr. Hooper, Sr. ran the day-to-day operations of the company. On April 21, 1969, he resigned and became Chairman of the Board and continued as Chief Executive Officer until his death in

1977. In 1969, James, Jr. succeeded his father as president.

CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(3), imposes strict liability upon prior owners or operators of a facility at the time of disposal. Under CERCLA "owner or operator" is defined as "any person owning or operating" an onshore facility, and the term "person" includes both individuals and corporations. It does not exclude corporate officers and employees. Id. at § 9601. Significantly, the definition of "owner or operator" excludes "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." Id. at § 9601(20(A).

Although CERCLA does not explicitly address whether a court may hold a corporate officer liable for response

costs, nor does it set forth any standard, courts have generally held that corporate officers may be personally liable under CERCLA for response costs. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032; Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987), aff'd, 889 F.2d 1497 (6th Cir. 1989), cert. denied, 110 S. Ct. 1527 (1990); United States v. Carolawn Co., 14 Env't L. Rep. 20,699 (D.S.C. June 15, 1984); but see Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222 (W.D. La. 1988), aff'd, 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

The standards of liability established by the decisions addressing this issue range from basing liability on personal participation in the waste disposal activities to emphasizing the

authority to control the wrongful conduct (the "authority to control analysis") or the ability to prevent contamination (the "prevention test"). This Court agrees with the line of cases which looks to an individual's authority to control a facility's waste disposal activities in determining a corporate officer's liability under CERCLA.

In United States v. NEPACCO, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), the Eighth Circuit applied the "authority to control analysis". In that case, the court held the president and major shareholder of NEPACCO liable as a "generator" under RCRA despite a finding that he had no knowledge of the plan to dispose of hazardous waste, nor was he present at the plant during the

period of waste disposal.[26] The Court reasoned that although the president was not "personally involved in the actual decision to . . . dispose of hazardous substances," he in fact was "in charge of and directly responsible for all of NEPACCO's operations . . . and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances." Id. at 744.

In a Second Circuit case, the court adopted a similar standard. In New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), the court held the principal officer and shareholder liable as an operator under CERCLA where a close corporation purchased contaminated

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[26]The Court observed that its "analysis of the scope of personal liability under the RCRA is similar to our analysis of the scope of individual liability under CERCLA." Id. at 745.

property, but did not actually dispose of hazardous substances. As in NEPACCO, the Shore Realty court determined that the defendant was liable as an operator because he was "in charge of the operation of the facility . . . . " Id. at 1052.

Moreover, several district courts have also focused on an officer's authority to control in determining liability under CERCLA. In United States v. Carolawn Co., 14 Env't L. Rep. 20,699 (D.S.C. June 15, 1984), the court held two corporate officers personally liable because they were responsible for the day-to-day operations of a hazardous waste disposal business. The court stated that a corporate officer may be liable under CERCLA if he "has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a

facility." Id. at 20,699. Likewise, in Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988), the court imposed personal liability on the managing shareholders because they participated in the general management and control of the corporation. The defendants testified that they made "decisions that relate to the managing business and the marketing business and the selling businesses and all the overall operations of the company." Id. at 831-32.

One district court has formulated a new standard for corporate officer liability. In Kelley v. Arco Industries Corp., 723 F. Supp. 1214, 1219 (W.D. Mich 1989) the court held that in a close corporation an individual is liable under CERCLA if he could have prevented or significantly abated the hazardous waste discharge forming the basis of the claim.

According to the Kelly court, factors relevant to a determination of "operator" liability include:

> evidence of an individual's authority to control, among other things, waste handling practices -- evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal.

Id. Consequently, the focus in this court's analysis is whether the corporate individual could have prevented the hazardous waste discharge at issue. Id.

Applying either the "authority to control analysis" or the "prevention test"

to the facts of the present case leads the Court to the same conclusion. Based on the summary judgment record and the undisputed facts regarding the individual Hooper defendants' involvement at the Site, the Court concludes that at or prior to the sale of the Hooperwood Mills in 1963, neither individual Hooper defendant was an owner or operator of the Site. From the early 1950s to June 1961, although both of these defendants were employed as salesmen for the company, both worked and lived outside of the Baltimore area. Moreover, even though they were board members during this time and vice presidents upon their return in 1963, it is clear from the record that neither defendant participated in the finishing plant operations at the Mill prior to 1969. See Nurad Exhibit I at 10-14, 50-52; Hooper Appendix D to Motion for

Summary Judgment (hereinafter "Hooper Appendix ___"), Lawrence Hooper Dep. at 33-48, 50-69; Hooper Appendix E.

In addition, the record demonstrates that neither had the ability nor the capacity to exercise such control over the operations since their father, James Hooper, Sr., as president during the relevant times, retained all decision-making authority over the company including the daily operations at the finishing plant. Mr. Hooper, Sr. also provided all pertinent instructions concerning his decision to sell the property, and voted, as trustee, the majority of stock interest in the company. See Hooper Appendix A, Finney Aff. ¶¶ 5, 6.[27]

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[27]As identified in the uncontradicted Affidavit of Jervis S. Finney presented by the individual Hooper defendants, "in (continued...)

Although CERCLA was meant to be interpreted broadly, Nurad has failed to support its assertion that James Hoover, Jr. and Lawrence Hooper controlled or had the ability to control the operations at the Site prior to its sale. Nor is there support for Nurad's contention that during this time the individual defendants could have prevented the abandonment of the USTs

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[27](...continued)
1958 and at least until 1966, the President and Chief Executive Officer of the Company was James E. Hooper [Sr.]. [Legal counsel to the Hooper Co.] received our instructions and all corporate approvals from James E. Hooper [Sr]. He was a man of strong will and temperament suited to running the entire affairs of the corporation, which he did. All major corporate decisions were made by Mr. Hooper. [He] also controlled and voted, as trustee, the majority of shares of stock of the corporation which had been placed in trust upon the death of his father, Robert Hooper." Hooper Appendix A, Finney Aff. at ¶ 5.

and the disposal of hazardous substances at the Site.[28]

The Court will therefore grant the individual Hooper defendants' motion for summary judgment on this issue and deny Nurad's motion for partial summary judgment as to these two defendants.

3. Frank S. Nicholl, Jr.

The Hooper Co. sold the entire Mill parcel, including the Site at issue in this case, to Property Investors, Inc.

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[28]The Court also rejects Nurad's argument that Lawrence and James, Jr. were owners and operators of the Site after the company's sale of the Mill in 1963. After the sale, the Hooper Co. leased Buildings 24 and 24A on the Site and conducted finishing operations there in 1966. Although Nurad correctly points out that during this time both defendants were vice presidents and directors of the company, Mr. Hooper, Sr. was still president in 1966 and was still sole trustee of the trust containing the voting stock. Based on this record, therefore, the Court concludes that during this time neither Hooper defendant had a position of power or the capacity to affect the decisions of the Hooper Co.

("Property Investors") on November 30, 1963. Property Investors owned the parcel until October 9, 1964, when it merged with Monumental Enterprises, Inc. ("Monumental"). Monumental then owned the parcel from October 9, 1964 until October 13, 1976.

Defendant Frank S. Nicholl, Jr. was the president and principal stockholder of both Property Investors and Monumental. During its ownership, Property Investors rented property at the Mill to Hooper, Nurad and others.

Nurad argues that partial summary judgment against Frank Nicholl is appropriate based on his status as a prior owner and operator of the Site from 1963 until 1976. Nurad contends that defendant Nicholl personally participated and controlled property management decisions relating to the Site and Mill on a routine

basis during the time he owned it. Nurad further suggests that Mr. Nicholl actively managed the corporations and routinely met and corresponded with the tenants on matters relating to the Site and their leases. According to Nurad, since Mr. Nicholl personally handled insurance and other business issues relating to the Mill, he had the authority and opportunity to empty the tanks and to address the contamination then existing. Nurad points out that in June, 1966, the Factory Insurance Association, the insurer of the Hooperwood Mills, conducted an inspection of the property and specifically recommended closure of the USTs. Mr. Nicholl failed to do so, and the tanks remained open during his ownership. Nurad suggests that had defendant Nicholl performed the tank closures at that time the potential environmental damage from

the USTs would have been substantially reduced.

Although Mr. Nicholl does not dispute that he was president and the principal shareholder of both Property Investors and Monumental during the relevant times, he argues that based on the present facts he can not be held liable as a prior owner or operator. He points out that there is no evidence that either Property Investors or Monumental operated a hazardous waste disposal business. Nor is there any evidence, according to defendant Nicholl, that he was involved in managing hazardous substances at the Mill. Even though his tenants might have handled such wastes, Nicholl points to the lease agreements with the tenants and argues that he had no authority to influence their decisions over these matters.

Applying either the "authority to control analysis" or the "prevention test" discussed above, the Court finds that based on this record Frank Nicholl was an owner or operator of the Site from 1963 until 1976. Mr. Nicholl's relationship to Property Investors and Monumental is similar to Mr. Hooper, Sr.'s relationship to Hooper Co.; both were officers actively involved in the day-to-day operations of the companies they owned and controlled. Here, like Mr. Hooper, Sr., Mr. Nicholl was aware of the USTs and their contents. Defendant Nicholl also recognized the need to empty them, and as the president and principal stockholder of Property Investors and Monumental who ran all aspects of those companies' operations, Mr. Nicholl certainly had the capacity and authority to properly dispose of the hazardous substances in them. See Nurad

Exhibits N, O at 2-3, P, Q, R; Deposition Transcript of Kenneth B. Mumaw (Paper No. 112) (hereinafter referred to as "Mumaw Deposition").

The Court rejects Mr. Nicholl's suggestion that as a landlord he had no authority to control his tenants' activities.

However, even assuming, arguendo, that he could not influence his tenants' decisions on these matters, it is clear that absentee landlords can be held liable under Section 107(a)(2) of CERCLA as prior owners at the time of disposal even though they have not participated in conduct resulting in the release of hazardous substances.

In United States v. Monsarto Co., 858 F.2d 160, 166 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) the Fourth Circuit rejected an argument similar to

the one made here by defendant Nicholl. In Monsanto. the site owners contended that they were innocent absentee landlords unaware or unconnected to the waste disposal activities that took place on their land. They argued that their lease with the tenants did not allow the tenants to store chemical waste on the premises, but they admitted that they became aware of waste storage and accepted lease payments. Nevertheless, the Fourth Circuit held

> In light of the strict liability imposed by section 107(a), we cannot agree with the site-owners contention that they are not within the class of owners Congress intended to hold liable. . . . The plain language of section 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste.

Id. at 169.

Based on this case law and the uncontradicted facts presented on the summary judgment record, the Court concludes that Frank Nicholl was an owner or operator of the Site from November 30, 1963 to October 13, 1976.[29]

4. Kenneth B. Mumaw

Monumental entered into a contract with Kenneth B. Mumaw to purchase the Hooperwood Mills on July 30, 1976. Nurad Exhibit S. Although the deed reflects a transfer date of October 13, 1976, Mr. Mumaw testified at his deposition that the documents were backdated and the actual property transfer took place in mid-November, 1976. See Mumaw Deposition at

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[29]The Court will address Mr. Nicholl's argument that there was no "disposal" and no evidence of the presence of hazardous substances in any tanks during his ownership infra at 45-46.

114-16. In August, 1976, defendant Mumaw contracted to sell three of the subdivided parcels and decided to keep the land and buildings to the south of the Site for himself. In September, 1976, Mr. Mumaw entered into a lease agreement with the Hooper Co. and agreed to rent certain buildings Mr. Mumaw had contracted to buy. Nurad Exhibit V. Defendant Mumaw also collected rent payments from tenants from July to October, 1976.

According to Nurad, Mr. Mumaw held an "equitable ownership" in the Site from the time he entered into the Contract for Sale, July, 1976, until he obtained full legal title to the property in mid-November, 1976. Nurad points out that in recognition of Mr. Mumaw's equitable interest, Mr. Nicholl obtained a fire insurance general endorsement for the Mill which named defendant Mumaw as an

additional insured. See Exhibit C to Nurad's Memorandum in Opposition to Mumaw's Motion for Summary Judgment.

Mumaw contends that two documents terminated his equitable ownership of the Site: 1) a Letter of Intent dated June 18, 1976 from Mr. Mumaw to Nurad to convey the Site and Mill to Nurad; and 2) the Contract of Sale with Nurad dated August 9, 1976. Relying on Kingsley v. Makay, 253 Md. 24, 251 A.2d 585 (1969), defendant Mumaw argues that he could not have acquired any equitable interest in the property in July since he had already agreed to sell it to Nurad in June.

Under Maryland law the doctrine of equitable conversion provides that a purchaser who has a valid, enforceable and binding agreement to convey, and thus can compel conveyance in an action for specific performance, should be treated as

the owner of the property. Watson v. Watson, 304 Md. 48, 61, 496 A.2d 794 (1985). The doctrine, however, does not apply to agreements to convey in which a condition precedent to enforceability has not been met since in this situation the purchaser does not have a right to specific performance. See H. McClintock, Handbook of the Principles of Equity § 106 at 287 (2d ed. 1948). Under the equitable conversion doctrine, the purchaser is treated as the equitable owner of the property. If at the time of contract, however, the vendor did not have the title which he contracted to convey, there is no conversion. Id. at 286-87.

In the present case, defendant Mumaw's Letter of Intent to Nurad and the Contract of Sale with Nurad did not terminate his equitable ownership in the Site for several reasons. First, the

Letter of Intent was expressly "contingent upon Mumaw's purchasing the Hooperwood Mills complex from Frank S. Nicholl Jr.'s [Property Investors]." Nurad Exhibit U. Because the Letter of Intent acknowledged that Mr. Mumaw's purchase was a condition precedent to the sale to Nurad, it did not preclude Mr. Mumaw's acquisition of an equitable interest in the property. Second, the August 9th Contract was not, on that date, specifically enforceable; there were conditions precedent to the Sale which had not been performed and thus Nurad could not have obtained equitable title to the property then. For example, Nurad had not obtained financing and Mumaw had not obtained subdivision approval. See Nurad Exhibit U. And third, the August 9th Contract of Sale provided that Mr. Mumaw bear the risk of harm to the

property until the actual settlement in November. See id.

Mr. Mumaw's reliance on Kingsley is misplaced. The status of the contract purchaser's equitable interest between the time he agreed to sell and the actual sale was not at issue in Kingsley. Rather, in that case the Maryland Court of Appeals determined whether the sale of an equitable interest in property must be recorded to be valid. Contrary to defendant Mumaw's suggestion, the Court did not hold that a buyer, prior to receipt of a deed, who contracted to resell the property had given up all equitable title to the property.

Based on these facts, the Court finds that Kenneth Mumaw was both a legal and equitable owner of the Site prior to its sale to Nurad in November, 1976. As such, he is liable as a prior owner under

Section 107(a)(2) of CERCLA.[30] Cf. United States v. Carolawn, 14 Env't L. Rep. 20,699 (D.S.C. June 15, 1984) (short-term owners can be subject to CERCLA liability).

b. Defendants Associated with the Site

1. Allstates Moving and Storage and Raymond B. McMillan

From 1966 to 1979, Sudler Moving and Storage d/b/a Allstates Moving and Storage, Inc. ("Allstates") leased certain buildings and portions of these buildings near the USTs at the Site and conducted a freight transfer and storage operation

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[30]Nurad also argues that Defendant Mumaw was an operator, of the Site from the mid-1960s to 1976. Because the Court s finds that this defendant is a prior owner, the Court need not address Nurad's operator argument. Mr. Mumaw's argument that there was neither a "disposal" nor a release of hazardous substances during his ownership will be discussed infra at 45-46.

there.[31] Raymond B. McMillan was the president and sole shareholder of Allstates from 1960 throughout Allstates' tenancy. Mr. McMillan ran Allstates' office at this location.

Nurad contends that Allstates and Mr. McMillan are liable under Section 107(a)(2) as former operators of the Nurad site. Arguing that Allstates had "control" over the facility, Nurad points to the fact that defendant Allstates had "access" to the area where the USTs were

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[31]Allstates leased the following buildings:

Building No.	Dates of Occupancy
First Floor of 4C	1966-1979
First Floor of 4B	1966-1979
First Floor of 4 & 4A	1966-1979
Buildings 24 & 24A	1975-1979
Buildings 28 & 28A	Before 1976-1977

See Exhibit D to Allstates' Memorandum of Law in Support of Motion for Summary Judgment (paper No. 102) (hereinafter "Allstates' Exhibit D").

located, that it had parking facilities in the vicinity of the USTs, and that Allstates conducted freight loading and unloading operations in the vicinity of the USTs. Nurad also alleges that prior to leasing the buildings, Allstates had inquired of the owner of the property whether the tanks would be available for use for fueling Allstates' vehicles. Nurad cites United States v. SCRDI, 653 F. Supp. 984 (D.S.C. 1984) to support its arguments.

Allstates, on the other hand, contends that it never "operated" the CERCLA site.[32] Citing to its leases with

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[32]Allstates also argues that Nurad's characterization of the entire Nurad property, 2165 Druid Park Drive, as a CERCLA "facility" is erroneous and that no "disposal" took place during Allstates' tenancy. Because the Court concludes that Allstates was not an "operator" of the Site even when defined to include the entire Nurad parcel, the (continued...)

Nurad,[33] Allstates points out that it did not have legal authority or actual physical control over the area of the Site where the USTs are or were located. According to Allstates, it was a tenant in only a portion of one group of buildings on the Site, with the right to use a certain parking area that did not include the land on which the USTs are located. Allstates further argues that it had no legal authority over the USTs or their contents, and thus it never actually exercised control over them.

Several courts have held tenants liable under CERCLA as owners or operators of a facility. See, e.g., United States v. SCRDI, 653 F. Supp. at 1003;

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[32](...continued)
Court need not address the "facility" argument. As to Allstates' "disposal" argument, see infra at n.35.

[33]See Allstates, Exhibit D.

International Clinical Laboratories, Inc. v. Stevens, 20 Env't L. Rep. 20,560, 20,561 (E.D.N.Y. 1990); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D.Pa. 1988); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987).

However, in determining liability the courts emphasize the tenant's control over or participation in the disposal of hazardous substances at the facility. See BCW Associates, Ltd. v. Occidental Chem. Corp., 1988 U.S. Dist. LEXIS 11275 (E.D. Pa. 1988) (tenant was not operator because tenant's activities at facility were "limited in scope, well-confined, and unrelated to the disposal or release of hazardous substances"); International Clinical Laboratories, Inc. v. Stevens, 20 Env't L. Rep. at 20561 (tenant liable as operator because it generated and

discharged hazardous wastes at site); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. at 1571 (purchaser-lessee liable where it actively contributed to the contamination of facility).

For example, in United States v. SCRDI, the case relied on by Nurad, the tenant and subtenant had leased all of the property where the facility was located and the subtenant was actively operating it. Finding both liable under CERCLA, the Court reasoned that the tenants "maintained control over and responsibility for the use of the property." 653 F. Supp. at 1003. It is clear from the decision that the degree of a tenant's control over a facility was critical to the court's determination. In fact, the court explained that "site control is an important consideration in

determining who qualifies as an owner under § 107(a)." Id.

In the present case, although Allstates had access to the USTs by virtue of Allstates' use of the common areas at the Site, the undisputed evidence clearly demonstrates that Allstates' tenancy was confined to a small group of buildings and its activities in and around those buildings were limited in scope and unrelated to the disposal or release of hazardous substances from the USTs. See Allstates' Exhibit D. Here, unlike the tenants in SCRDI, Allstates never owned, leased, used or managed the USTs or their contents; rather, the evidence demonstrates that the Mill owners had control over the common areas. See Mumaw Deposition at 60-66, 80-82. Also unlike the tenants in SCRDI, Allstates never actively participated in the disposal of

hazardous substances at the Site. In the Court's view, Allstates' mere access to the USTs, without more, is insufficient to support a finding of "operator" status under CERCLA. See Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988), aff'd, 861 F.2d 155 (7th Cir. 1988). Because the Court concludes that Allstates lacked the requisite degree of control over the USTs, and that it was not involved in the disposal or release of hazardous substances at the Site, the Court will grant Allstates' motion for summary judgment as to the CERCLA count and deny Nurad's motion for partial summary judgment as to Allstates' liability under CERCLA.

The Court further finds that the grounds for granting Allstates' motion for summary judgment on the CERCLA count also support granting summary judgment in

Allstates' favor on Nurad's negligence claim against Allstates. In Count 2, Nurad alleges that Allstates had a duty to warn Nurad of the existence, contents and condition of the USTs. Because the Court has concluded that Allstates lacked the legal authority and actual control over the USTs, their contents or the land on which they are located, Allstates had no legal duty, as a matter of law, to warn Nurad about them. See Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1357 (D. Md. 1982) (common law duty to warn others of dangerous condition arises only where defendant owns the property on which the dangerous condition exists or "at least the right or a duty to control, if not actual control over, the activity causing the harm."). Accordingly, the Court will grant

Allstates' motion for summary judgment as to Count 2.

The Court will also grant Mr. McMillan's motion for summary judgment as to the CERCLA and common law counts and deny Nurad's motion for partial summary judgment as to his liability under CERCLA. Nurad has not alleged any facts, aside from the fact that Mr. McMillan was president and the sole shareholder of Allstates, to support its allegation that defendant McMillan is a responsible party under CERCLA Section 107(a). Because the Court has concluded that Allstates is not liable under either CERCLA or Maryland common law, Mr. McMillan is also not liable under CERCLA as a prior operator or

under Maryland common law for negligence.[34]

2. Universal Laboratory Installations. Inc.

Although Universal was not a tenant on the Site like Allstates, for approximately nine months during 1972 Universal occupied Buildings 28 and 28A (herein collectively referred to as "Building 28") which are located directly east of Nurad's property. Universal installs cabinets, shelving and other materials at installations where it is

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[34]Raymond McMillan filed a third party complaint against Zemco claiming that Zemco was also a tenant at the Site. Zemco has filed a motion for summarY judgment arguing that it never leased property at the Site. In responding to this motion, Allstates and Mr. McMillan acknowledged that if their motion for summary judgment was granted then "Allstates would have no objection to dismissal of Zemco." Paper No. 124 at 5. Accordingly, the Court will grant Zemco s motion for summary judgment.

engaged by contract to perform such work. During nine months in 1972, Universal used the upstairs portion of Building 28 as an office and a portion of the first floor for tool and hardware storage. Universal had no other rights in the property, other than ingress and egress, the right to use the loading dock on the west side of Building 28, and the right to use the door located on the south side of Building 28 for entering and leaving the building.[35]

Even when the Court characterizes Building 28 as part of the Nurad "facility," applying the test discussed above to these facts leads the Court to the conclusion that Universal is not liable under CERCLA as an operator of the

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[35]See Universal's Memorandum of Law In Support of Motion for Summary Judgment, Exhibit C (Affidavit of Charles F. Metzger, Sr.) (hereinafter "Metzger Affidavit")

Site during its occupancy of Building 28. Although Universal never executed a written lease in connection with its use of Building 28, the record demonstrates that like Allstates', Universal's association with the Site was confined to a specific area; the first and second floors of Building 28. Metzger Affidavit. Also like Allstates, Universal never participated in the disposal of hazardous substances at the Site. Id. Nor did it use, store or transport any hazardous substances or any other chemicals in connection with its occupancy of Building 28. Id. Moreover, during this time, Universal had no knowledge of the existence of the USTs at the Site. Id.

Based on these undisputed facts, the Court concludes that Universal did not have the control or the authority to control the operations or decisions

involving the disposal of hazardous substances at the Site or the contents of the USTs. Thus, the Court will grant Universal's motion for summary judgment on the CERCLA and negligence counts and deny Nurad's motion for partial summary judgment as to CERCLA liability.

3. Monumental Millwork, Inc.

Monumental Millwork was not a tenant on Nurad's property and it never used or occupied any portion of the Site. From 1968 to 1978 it occupied a portion of Building 2 located at 2139 Druid Park Drive, southeast of the Site.[36] Monumental Millwork used Building 2 to assemble doors and windows and to store them for subsequent distribution. Like Universal, Monumental Millwork neither had

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[36]See Monumental Millwork's Memorandum of Law in Support of Motion for Summary Judgment Exhibits A, C (hereinafter "Monumental Exhibit __").

knowledge of the USTs nor did it use hazardous substances or the USTs in connection with its tenancy of Building 2. See Monumental Exhibit B; Mumaw Deposition at 211-213. Even assuming that Building 2 is part of the Nurad "facility," the Court concludes that Monumental Millwork is in the same position as Universal; during its occupancy of Building 2 it did not maintain control over or responsibility for the USTs or hazardous substances at the Site and it never participated in the disposal of hazardous substances there. Accordingly, the Court will grant Monumental Millwork's motion for summary judgment on the CERCLA and negligence counts and will deny Nurad's motion for partial summary judgment as to CERCLA liability.

5. Owners or Operators At the Time of Disposal

In addition to finding that a party is an owner or operator, under Section 107(a)(2) of CERCLA a plaintiff must also demonstrate that a "disposal" of hazardous substances occurred at the facility during the defendant's ownership or operation. 42 U.S.C. § 9607(a)(2). Because the Court has found that the Hooper Co., Mr. Nicholl and Mr. Mumaw are prior owners or operators, the Court will now address whether a "disposal" of hazardous substances occurred during each of these defendant's ownership or operation of the Site.

a. The Hooper Co.

CERCLA adopts by reference the RCRA definition of "disposal" which includes:

> the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid

> waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

42 U.S.C. §§ 9601(29), 6903(3).

The few reported decisions concerning the definition of "disposal" have held that depositing hazardous substances into subsurface receptacles constitutes "disposal" within the meaning of CERCLA. See Westwood Pharm., Inc. v. National Fuel Gas Distr. Corp., 737 F. Supp. 1272, 1278 (W.D.N.Y. 1990); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 791 (D. N.J. 1989). Moreover, it is clear from the language of the statute that disposal occurs even when hazardous substances are placed in underground receptacles that are structurally sound,

since in doing so they "may" enter the environment. Westwood, at 1278.

Here, Nurad alleges a "disposal" of hazardous substances occurred during the Hooper Co.'s ownership of the Site because: 1) Hooper employees occasionally spilled MIBK at the Site; 2) the company placed MIBK and mineral spirits in USTs between 1926 and 1962; 3) Hooper ceased using the USTs in 1962; and 4) Hooper abandoned the USTs by selling them to Property Investors in 1963.

The Hooper Co. contests that it disposed of any hazardous substances at the Site. Hooper disputes that its employees spilled MIBK at the property or that the USTs were leaking during its ownership. Hooper further suggests that it did not dispose of the USTs by selling them to Property Investors since in doing so Hooper was transferring a "useful

substance for a useful purpose." To support this argument, Hooper points to both the Contract of Sale and the Bill of Sale between Hooper and Property Investors which specifically listed the USTs as items sold. Such a sale, according to Hooper, does not constitute an "abandonment" of the USTs as Nurad suggests.

The Court finds that genuine issues of material fact exist as to whether any Hooper employee spilled MIBK onto the Site and whether MIBK was stored in any of the USTs during Hooper's ownership of the Site. Nurad has presented the testimony of Gary W. Pope, a supervisor at Hooper's finishing plant from 1935 to 1962, to support its claim that Hooper spilled MIBK at the Site. At his deposition, however, Mr. Pope testified that Hooper employees "may" have spilled MIBK onto the ground

while transferring it from 55 gallon drums to 5 gallon buckets. Moreover, to contradict insurance records presented by Nurad to show that MIBK was stored in the USTs, Hooper relies on the testimony of Mr. Pope who stated that Hooper never stored MIBK in any UST during his tenure with the company. Based on this conflicting evidence, the Court can not conclude at this time that MIBK was spilled on the ground at the Site or was stored in the USTs by the Hooper Co. during its ownership.

It is undisputed, however, that the Hooper Co. stored mineral spirits in two USTs on the Site from 1935 through mid-1962.[37] In a 1963 Bill of Sale to Property Investors, the Hooper Co. acknowledged that these tanks contained

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[37] See supra at 11, 15.

solvents and processing materials. Moreover, Mr. Pope testified that Hooper stored mineral spirits in two USTs. Because the Court has determined that mineral spirits is a hazardous substance under CERCLA,[38] the Court concludes that the Hooper Co. "disposed" of hazardous substances at the Site by storing mineral spirits in the USTs. See Westwood, 737 F. Supp. at 1278.

The Court also rejects the Hooper Co.'s argument that the sale of the USTs and the Site "reverses" the company's previous disposal of hazardous substances at the Site. Hooper relies on Brockton Wholesale Beverage Co. v. Chevron U.S.A., Inc., 1990 U.S. Dist. LEXIS 9998 at 2 (D. Mass. 1990) and C. Greene Equip. Corp. v. Electron Corp., 697 F. Supp. 983 (N.D.

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[38]See supra at 9.

Ill. 1988) to support its argument on this point. These cases, however, are inapposite for two reasons. First, they do not involve the sale of previously disposed of materials. Second, the courts in these cases were interpreting a different section of CERCLA; the courts were determining whether a defendant had "arranged for disposal or treatment . . . of hazardous substances" pursuant to Section 107(a)(3) of CERCLA which relates to "generators," a group of potentially responsible parties entirely different from those under Section 107(a)(2) who "own or operate a facility at the time of disposal" which is at issue in this case.

In sum, on the basis of the summary judgment record, the Court concludes that Hooper deposited mineral spirits into the USTs during its ownership of the Site. Since the Court finds that Hooper's

subsequent sale of the USTs and the Site does not "reverse" these previous actions, the Court finds that the Hooper Co. disposed of hazardous substances during its ownership of the Site. The Court will therefore deny the Hooper Co.'s motion for summary judgment as to the Hooper Co. and will grant Nurad's motion for partial summary judgment against Hooper Co. on the issue of CERCLA liability.

Nurad also argues that Hooper "operated" the Site when it leased two buildings on the Site (Buildings 24 and 24A) and conducted finishing operations there for a few years beginning in 1966. Hooper used the Building 28 tank in that operation. Although it is undisputed that Hooper did not actively dispose of hazardous substances during its operation of this building, Nurad argues that the passive migration and reposing of

hazardous substances at the Site during this time constitute "disposal" under CERCLA.

Nurad relies on United States v. Waste Industries, Inc., 734 F.2d 159, 164 (4th Cir. 1984), to support its broad interpretation of "disposal." In that case, the Fourth Circuit held that "disposal," as so defined in RCRA, encompasses both hazardous waste in a state of repose at a site and the gradual leaking of wastes into the environment:

> The inclusion of "leaking" as one of the diverse definitional components of "disposal" demonstrates that Congress intended "disposal" to have a range of meanings, including conduct, a physical state, and an occurrence. Discharging, dumping and injection (conduct), hazardous waste reposing (a physical state) and movement of waste after it has been placed in a state of repose (an occurrence) are all encompassed in the broad definition of disposal.

Id. at 164 (holding that Section 7003 of RCRA applies to inactive disposal sites); see also United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1399 (D. N.H. 1985), aff'd in part, vacated in part, 900 F.2d 429 (1st Cir. 1990) ("'disposal' includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions.") (quotations omitted).

The Court disagrees with Nurad's assertion that the Fourth Circuit's definition of disposal in Waste Industries is controlling law in the present case. That case, which was not a CERCLA action, addressed a different factual and legal context than the one presented here. In Waste Industries, the court considered whether in 1979 the EPA had authority under RCRA to require remediation by

former owners or operators of an inactive landfill. The Fourth Circuit ruled that RCRA § 7003 is "designed to deal with situations in which the regulatory schemes break down or have been circumvented . . . Congress expressly intended that this other language (RCRA § 7003] close loopholes in environmental protection." Id. at 164. Applying the law as it was before the enactment of CERCLA, it appears that the only way for the Waste Industries court to preserve the EPA's ability to demand cleanup by the actual former owners and operators was to define "disposal" in RCRA to cover completely passive repose or movement through the environment.

The circumstances that motivated the Fourth Circuit to define "disposal" so broadly in RCRA § 7003 do not exist in this situation. Here, the current owner and all prior owners and operators are

parties to this CERCLA action and as noted above some of them are liable for the response costs. Although CERCLA adopts by reference the definition of "disposal" found in RCRA, it also adds the term "release" to cover both active and passive conditions. The Waste Industries court construed the term "disposal" in the RCRA context, where there was otherwise no responsibility for conditions corresponding to a CERCLA "release." In enacting CERCLA, Congress expressly limited CERCLA liability to former owners "at the time of disposal," a phrase which must refer to an action or have no meaning at all.

These contextual differences have also been recognized by other courts which have required some affirmative action to constitute disposal under CERCLA. In Ecodyne Corp. v. Shah, 718 F. Supp. 1454,

1457 (N.D. Cal. 1989), for example, the district court dismissed an intermediate owner on summary judgment grounds. In construing the term "disposal," the court looked to the grammar and structure of RCRA § 1004(3), 42 U.S.C. § 6903(3):

> The meaning of a word is or may be known from the accompanying words - this is the principle of noscitur a sociis. In ascertaining what disposal means, the Court looks at its definitional components and finds that these three nouns (discharge, deposit and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the Court notes that "placing", read in the context of the statute, means a person introducing - putting - formerly controlled or contained hazardous substances into the environment. For plaintiff solipsistically to read, for example, "leaking" as meaning the general migration of chemicals and, as such, a disposal under § 9607(a)(2), renders not only the definitional phrase of RCRA §

> 6903(3)_"into or on any land or water" superfluous, but would also conflict with the general structure of § 9607(a)"

Id. The Court concluded that the scope of liability under CERCLA § 107(a)(2) does not automatically reach intermediate former owners recognizing that:

> To define disposal as plaintiff wishes would effectively make all property owners from the time a site became polluted (up to and including the current owner) potentially liable under §9607(a)(2) even if these owners did not introduce the chemicals onto the site.

Id.

Other cases have also limited the scope of Section 107(a)(2) liability to prior owners or operators who actively dispose of or introduce hazardous substances into the environment. See In re Diamond Reo Trucks, Inc., 115 Bankr. 559, 565 (Bkrtcy W.D. Mich. 1990) (concluding "the mere ownership of the

site during the period of time in which migration or leaching may have taken place, without any active disposal activities, does not bring [the defendant] within the liability provision of § 9607(a)(2)"); Emhart Industries. Inc. v. Duracell International, Inc., 665 F. Supp. 549; cf. 3550 Stevens Creek Association v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990) (construing "disposal" for purposes of Section 107(a)(2) as requiring some affirmative act of discarding a substance as a waste), cert. denied, 111 S. Ct. 2014 (1991).

This Court is persuaded by these authorities and also reads Section 9607(a)(2) as only providing an action against prior owners or operators of a site who actively dispose of hazardous substances at the site during their ownership or operation. Congress intended

that courts impose CERCLA liability on those responsible for the contamination. This Court's reading of Section 107(a)(2) is consonant with that purpose.

Because Nurad has not alleged, and the record does not show, that any active disposal took place during Hooper's "operation" of Building 24, the Court holds that the Hooper Co. is not liable under CERCLA for its operations at Building 24. Accordingly, the Court will deny Nurad's motion for partial summary judgment on this issue.

b. Frank Nicholl and Kenneth Mumaw

Although the Court has found defendants Nicholl and Mumaw are prior owners or operators of the Site, Nurad has not produced any evidence that either actively disposed of hazardous substances during their ownership or operation. Nurad relies solely on its assertion that

hazardous substances were "reposing" in the USTs during their ownership or operation to support its "disposal" argument. As discussed above, in this Court's view, reposing hazardous substances in USTs do not constitute "disposal" under Section 107(a)(2) of CERCLA. Thus, the Court will deny Nurad's motion for partial summary judgment against defendants Nicholl and Mumaw on the CERCLA liability issue and will grant Mr. Mumaw's motion for partial summary on the CERCLA issue.[39]

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[39]In reaching this conclusion, the Court also notes that even if the Court had adopted Nurad's position regarding the operator status of the tenant defendants (Allstates, Universal and Monumental Millwork), these defendants would still not be liable under CERCLA. Nurad has not presented any evidence that these defendants actively disposed of hazardous substances during their tenancy. Thus, like Mr. Mumaw and Mr. Nicholl, there was no "disposal" during their "operation" of the Site.

6. Equitable Defenses

The final argument made by the Hooper Co. is that Nurad's CERCLA action is barred by the equitable defenses of laches, unclean hands and estoppel. Hooper relies on this Court's decision in United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986) (Judge Young) to support its argument that these doctrines provide defenses to Section 9607(a) liability. In that case, the Court adopted the analysis and holding of United States v. Mottolo, 605 F. Supp. 898 (D. N.H. 1985), which, in turn, explicitly embraced the equitable defenses of laches, unclean hands and estoppel in CERCLA private cost recovery actions. Dickerson, 640 F. Supp. at 451 (citing United States v. Mottolo, 605 F. Supp. at 901-09). The court in Dickerson, however, declined to apply the equitable defenses to its present situation because

the United States brought suit in its sovereign capacity. Id.

To the extent that the Dickerson Court recognized equitable defenses to CERCLA liability, the Fourth Circuit's decision in United States v. Monsanto Co., 858 F.2d 160, 170 (4th Cir. 1988) effectively overrules that part of the decision. In Monsanto, the Fourth Circuit explicitly stated that there are no defenses to CERCLA liability other than the specifically enumerated defenses in the statute.[40] The Court explained that

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[40]Section 107(b) of CERCLA, 42 U.S.C. § 9607(b) sets forth the following defenses to Section 107 liability: where the release or threatened release of a hazardous substance was caused by: 1) an act of God; 2) an act of war; 3) an act or omission of a third party; or 4) any combination thereof. The exclusivity of section 107(b) defenses is explicitly discussed in Section 107(a) which provides for liability "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth" in Section 9607(b).

while "equitable factors are relevant in subsequent actions for contribution," "[t]hey are not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment." United States v. Monsanto, 858 F.2d at 171 n.22 (rejecting site-owners' contention that limited degree of participation rendered finding of joint and several liability inequitable).

The majority of cases addressing this issue have also concluded that the only defenses to CERCLA liability are the statutory defenses enumerated in Section 107(b). See, e.g., Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1445 n.3 (W.D. Mich. 1989) (citing numerous cases); see also United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir.

1989), cert. denied, 110 S. Ct 1527 (1990). In addition, many of the courts considering this question have gone further and have specifically held that equitable defenses are not relevant to a determination of CERCLA liability under Section 107(a). See, e.g., United States v. Monsanto, 858 F.2d at 171 n.22; Smith Land & Improv. Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989) ("doctrines such as caveat emptor and 'clean hands' . . . do not comport with congressional objectives."); United States v. Western Processing Co., 734 F. Supp. 930, 939 (W.D. Wash. 1990) (rejecting unclean hands defense); Allied Corp. v. Acme Solvents Reclaiming Inc., 691 F. Supp. 1100, 1110 (N.D. Ill. 1988) (same); General Electric Co. v. Litton Business Systems Inc., 715 F. Supp. 949, 956 (W.D. Mo. 1989) (same),

aff'd, 920 F.2d 1415 (8th Cir. 1990), cert. denied, 111 S. Ct. 1390 (1991); Chemical Waste Management Inc. v. Armstrong World Industries, Inc., 669 F. Supp. 1285, 1291 n.7 (E.D. Pa. 1987) (same).[41]

This Court is persuaded by these authorities and concludes that the limited defenses of Section 107(b) are exclusive and that equitable defenses such as those asserted here by Hooper - unclean hands, laches and estoppel - cannot be asserted

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[41]These decisions are also consistent with congressional intent. "The listed defenses are the only defenses which are available to avoid liability under Section 107(a). There should be no other defenses, including equitable defenses, that defeat: liability under sections 106 and 107 of the act." 131 Cong. Rec. H11074 (daily ed. Dec. 5, 1985) (comments of Representative Eckhart, primary sponsor of 1986 amendments) (emphasis added) quoted by United States v. Western Processing Co., 734 F. Supp. at 939.

in a private cost recovery action under CERCLA.

II. Motion to Bifurcate

Nurad has moved, pursuant to Fed. R. Civ. P. 42(b), to bifurcate the issues of liability and damages in this action. Nurad argues that bifurcation is appropriate in CERCLA private cost recovery suits because the statute authorizes plaintiffs who have incurred some response costs to seek a judgment of liability against other responsible parties for those costs and a declaration of liability as to future costs. See 42 U.S.C. § 9613(g)(2). Nurad also argues that because it has not incurred costs associated with a "remediation"[42] of the

[42]Costs incurred in responding to releases of hazardous substances are divided by CERCLA into two categories:
(continued...)

site, the necessity and consistency of those response costs with the NCP are appropriately addressed during the damages stage of the proceedings. Nurad further contends that delaying this determination will lead to a more economical and expeditious resolution of the case because proof of necessity and consistency requires the presentation of evidence and witnesses different from that required for a liability determination. Nurad points out that if any defendant is exculpated on the issue of liability that defendant can avoid the time and expense associated with trial on the separate issue of damages.

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[42](...continued)
removal actions and remedial actions. 42 U.S.C. 9601(25). Removal actions include those acts taken in response to an immediate threat to the public welfare or to the environment. Id. 9601(23). Remedial actions, on the other hand, are considered long-term permanent remedies. Id. § 9601(24).

Defendants,[43] on the other hand, oppose bifurcation. Relying on Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 794 (D. N.J. 1989), they argue that under CERCLA a determination of consistency with the NCP is an essential element of plaintiff's case on liability. Defendants further dispute Nurad's allegation that future "remediation" costs have yet to be incurred.

The better reasoned decisions addressing this issue have held that bifurcation of liability and consistency with the NCP is appropriate where the factual record does not permit a determination of consistency with the NCP at the time the motion for summary

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[43]Universal and the Hooper defendants have filed oppositions to Nurad's motion to bifurcate. (Paper Nos. 101, 104).

judgment is filed or where the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP. See, e.g., County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1513 (10th Cir. 1991) (citing cases); see also Emhart Industries, Inc. v. Duracell International Inc., 665 F. Supp. at 574; Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984) (citing Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1144 n.16 (E.D. Pa. 1982)).

In the present case, the record on consistency with the NCP is incomplete since Nurad alleges that future response costs associated with "remediation" of the site have yet to be incurred. Thus, the Court will grant Nurad's motion to bifurcate.

CONCLUSION

For the reasons stated above the Court will 1) grant Nurad's motion for partial summary judgment against the Hooper Co. and deny the Hooper defendants' motion for summary judgment as to the Hooper Co.; 2) grant the Hooper defendants' motion for summary judgment as to the individual Hooper defendants on the CERCLA issue and deny Nurad's motion for partial summary judgment as to James and Lawrence Hooper; 3) deny Nurad's motion for partial summary judgment as to Mr. Nicholl; 4) grant Kenneth Mumaw's motion for partial summary judgment on the CERCLA count and deny Nurad's motion for partial summary judgment as to Mr. Mumaw; 5) grant Allstates' and Raymond McMillan's motion for summary judgment as to the CERCLA and negligence counts and deny Nurad's motion for partial summary judgment as to

Allstates and Mr. McMillan; 6) grant Universal's motion for summary judgment and deny Nurad's motion for partial summary judgment as to Universal; 7) grant Monumental Millwork's motion for summary judgment and deny Nurad's motion for partial summary judgment as to Monumental Millwork; 8) grant Zemco's motion for summary judgment; 9) grant Nurad's motion to bifurcate; and 10) deny as moot James Hooper's motion to dismiss.

A separate Order will be entered.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NURAD, INC.	*	
v.	*	CIVIL ACTION NO. WN 90-661
WM. E. HOOPER & SONS CO. et al.	*	
	*	

* * * * * * * * *

ORDER

In accordance with the foregoing Memorandum and for the reasons state therein, IT IS this 15th day of August, 1991, by the United States District Court for the District of Maryland, **ORDERED:**

1. That Plaintiff's Motion To Bifurcate the Issues of Liability and Damages (Paper No. 94) is **GRANTED**;

2. That Plaintiff's Motions for Partial Summary Judgment on the CERCLA issue (Paper Nos. 96, 145) are **DENIED** as to

   a. Defendants James E. Hooper, Jr. and Lawrence Hooper

b. Defendant Kenneth B. Mumaw

c. Defendant Frank S. Nicholl, Jr.

d. Defendant Universal Laboratory Installations, Inc.

e. Defendant Monumental Millwork, Inc.

f. Defendant Allstates Moving and Storage

g. Defendant Raymond B. McMillan;

3. That Plaintiff's Motion for Partial Summary Judgment (Paper No. 96) is **GRANTED** as to Defendant Wm. E. Hooper & Co.;

4. That Defendant Wm. E. Hooper & Co.'s Motion for Summary Judgment (Paper No. 97) is **DENIED** as to Wm. E. Hooper & Co. and **GRANTED** as to James E. Hooper, Jr. and Lawrence L. Hooper;

5. That Defendant Kenneth B. Mumaw's Motion for Partial Summary Judgment (Paper No. 93) is **GRANTED**;

6. That Defendant Allstates Moving and Storage and Raymond B. McMillan's Motion for Summary Judgment (Paper No. 102) is **GRANTED**;

7. That Defendant Universal Laboratories, Inc.'s Motion for Summary Judgment (Paper No. 137) is **GRANTED**;

8. That Defendant Monumental Millwork Inc.'s Motion for Summary Judgment (Paper No. 138) is **GRANTED**;

9. That Defendant Zemco Corporation's Motion for Summary Judgment (Paper No. 113) is **GRANTED**;

10. That Defendant Lawrence L. Hooper's Motion to Dismiss (Paper No. 133) is **DENIED** as **MOOT**; and

11. That the Clerk of Court shall mail copies of the foregoing Memorandum

and this Order to all counsel of record in this case.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

APPENDIX C

§ 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by-

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are

conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation,

and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

§ 6903. Definitions

As used in this chapter:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any

land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

§ 9601. Definitions

For purpose of this subchapter-

. . . .

(29) The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903].

. . . .

(35) (C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a

hazardous substance, shall be liable for-

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund

established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

L29120.261

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

No. 92-356

In The

Supreme Court of the United States

October Term, 1992

KENNETH B. MUMAW,

Petitioner,

v.

NURAD, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that a person who owned a facility at a time when hazardous substances were leaking from underground tanks may be liable for cleanup costs as a "person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" under Section 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

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JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 29, 1992. A timely petition for writ of certiorari was filed on August 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The statutes involved are reproduced in Appendix C to the Petition. Nurad disagrees that 42 U.S.C. § 6902 (objectives and national policy under the Resource Conservation and Recovery Act ("RCRA")) and 42 U.S.C. § 9601(35)(C) (defining the limits of the third party defense to liability under Section 107(b)(3) of CERCLA) are relevant to the question presented.

STATEMENT OF THE CASE

Nurad, Inc. ("Nurad")[1] has spent more than $250,000 since 1988 to address hazardous substance contamination at its property in Baltimore, Maryland ("Site"). Soil and groundwater at the Site were contaminated when discarded solvents leaked from long-abandoned underground storage tanks. Nurad is currently studying the full extent of contamination and must still design and implement a final cleanup. Kenneth B. Mumaw

[1] Nurad is a wholly-owned subsidiary of Dover Technologies, Inc. which is wholly-owned by Dover Corp.

("Mumaw"), who sold the Site to Nurad in 1976, seeks to avoid liability for his share of the cleanup costs.

The Site has had several owners since the Wm. E. Hooper & Sons Co. ("Hooper") last used the tanks in 1962. A wholly-owned company of real estate investor Frank Nicoll ("Nicoll") bought Hooperwood Mills, of which the Site was a part, from Hooper in 1963. Mumaw, who had worked at Hooperwood Mills in various capacities since 1933 and was in charge of maintenance of the facilities during Nicoll's ownership, bought Hooperwood Mills from Nicoll in 1976. Mumaw subdivided the Mill and sold the Site to Nurad the same day. Mumaw still owns most of the Mill. Neither Nicoll, whose insurer instructed him to close the tanks in 1965, nor Mumaw, whose personal knowledge of Hooper's use of the tanks for solvent storage dates back to the 1940s, ever responded to the environmental threats posed by the discarded solvents.

Nurad never used the tanks and did not even know they contained hazardous substances until October 1988. Upon learning the tanks' contents, Nurad undertook an immediate emergency response. Thereafter, it filed a private cost recovery action in the United States District Court for the District of Maryland under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and certain common law claims against the prior owners of the Site and against former tenants.

On cross-motions for summary judgment as to liability, the district court determined that Mumaw was not

liable to Nurad on the sole ground that no "active disposal" occurred during his ownership. Nurad's motion for summary judgment against the now-defunct Hooper Co. and the summary judgment motions filed by the otner defendants were also granted.[2] The district court authorized an immediate appeal in accordance with Fed. R. Civ. P. 54(b).

The Fourth Circuit reversed the grant of summary judgment in favor of Mumaw; it affirmed the balance of the District Court's judgment. Pet. A-40. In an unanimous opinion, Judge Wilkinson rejected the District Court's construction of Section 107(a)(2) of CERCLA which imposes liability for cleanup costs on any person who owns or operates a facility at the time of hazardous substance disposal. CERCLA defines "disposal" by reference to the definition of "disposal" in the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 9601(29). Under both statutes, "disposal" means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment

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[2] Nicoll did not move for summary judgment in the district court. In denying Nurad's motion for summary judgment against Nicoll, the District Court concluded, as it did for Mumaw, that Nicoll was not liable solely because there was no active disposal during his ownership, notwithstanding its conclusion that Nicoll "was aware of the USTs and their contents, . . . recognized the need to empty them, . . . [and] had the capacity and authority to properly dispose of the hazardous substances in [the USTs]." Pet. A-89.

> or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Based on Congress' inclusion of "leaking" in the statutory definition of "disposal," the Court of Appeals concluded that Section 107(a)(2) of CERCLA imposes liability "not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking.' " Pet. A-34. The court further determined that "the record supports the conclusion that . . . Mumaw owned the facility at a time when the [solvents] were 'leaking' from the tanks." *Id.* Therefore, Mumaw was liable to Nurad under Section 107(a)(2) and summary judgment should have been entered in favor of Nurad rather than Mumaw. Pet. A-40.[3]

ARGUMENT

Section 107(a)(2) of CERCLA imposes liability on persons who own property at the time of hazardous substance disposal. As the Court of Appeals correctly held, the statute expressly equates disposal with leaking. It also correctly determined on this record that underground storage tanks were leaking hazardous substances during Mumaw's ownership. The court therefore concluded that

[3] Parties to the proceedings before the circuit court were Hooper and two of its officers and directors, Lawrence Hooper and James E. Hooper, Jr., Kenneth Mumaw, and tenants Allstates Moving & Storage and its president Raymond B. McMillan, Universal Laboratory Installations, Inc. and Monumental Millwork. Nicoll was not a party to the appeal.

there was an adequate factual predicate for liability. The decision below falls squarely within the terms of Section 107(a)(2) on its facts and is not contradicted by any other circuit court decision. No exercise of this Court's discretionary review is warranted.

A. The decision below is the only case in which a federal appellate court has decided whether a former owner is liable under Section 107(a)(2) for leakage of hazardous substances from storage tanks during his ownership. Consequently, no conflict among decisions of the courts of appeals on this issue exists.[4]

Petitioner has argued instead that there is a conflict among the *district* courts on this question. The existence of a conflict among district courts, however, is not one of the reasons identified in this Court's rules for the exercise of its discretionary certiorari jurisdiction. *See* Sup. Ct. R. 10.1. No circuit court has ever adopted the view of the decisions cited by Petitioner. If and when that occurs, that

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[4] In cases arising under RCRA, both the Fourth Circuit and the District of Columbia Circuit earlier determined that the equation of "disposal" with "leaking" means that disposal can be continuous. *See In Re Consolidated Land Disposal Regulation Litigation*, 938 F.2d 1386, 1389 (D.C. Cir. 1991) (deferring to the Environmental Protection Agency's interpretation of "disposal" which includes the continuing presence of waste at a facility because "such hazardous wastes or constituents may continue 'leaking' or 'may enter the environment or be emitted . . . or discharged' . . . into the environment"); *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984) (concluding that disposal includes not only active conduct, but also a physical state of hazardous waste in repose and the occurrence of waste moving in the environment after being placed in a state of repose).

issue may achieve the importance needed to warrant this Court's consideration. That is not this case.

B. Further, Petitioner overstates the purported conflict among the district courts. The vast majority of the United States district courts have adopted the Fourth Circuit's position that active conduct is not a prerequisite to "disposal" under either RCRA or CERCLA.[5] They also

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[5] *See e.g., Westwood Pharmaceuticals v. National Fuel Gas Distr.*, 737 F. Supp. 1272, 1278 (W.D. N.Y. 1990) (depositing hazardous substances into subsurface receptacles, even if they are structurally sound and failing to remove all such substances before relinquishing the site constitutes disposal under CERCLA); *In Re Hemingway Transport, Inc.*, 108 B.R. 378, 382 (Bankr. D. Mass. 1989) (the presence of drums that are "deteriorating and thus 'leaking' due to their exposure to the elements over a period of years" is disposal sufficient to impose liability under Section 107(a)(2)), *quoting American Mining Congress v. EPA*, 824 F.2d 1177, 1196 (D.C. Cir. 1987) (Mikva, J., dissenting) ("the definition [of disposal] is functional: waste is disposed under this provision if it is put into contact with land or water in such a way as to pose the risks to health and the environment that animated Congress to pass RCRA"); *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 791-92 (D.N.J. 1989) (PCB spillage constitutes disposal under CERCLA); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783 (W.D. Mich. 1989) (failure to operate purge wells which permitted the spread and migration of previously placed hazardous waste constitutes disposal under CERCLA); *Guidice v. BFG Electroplating and Mfg. Co., Inc.*, 732 F. Supp. 556, 564 (W.D. Pa. 1989) (presence of rusty drums which lacked lids but contained hazardous waste was sufficient to constitute disposal under CERCLA); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987) (leaching of hazardous substances through the soil and into groundwater constitutes disposal under CERCLA); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1399 (D.N.H. 1985) (CERCLA " 'disposal' includes within its purview leaking,

conclude that Section 107(a)(2) embraces interim owners, even if no "active" disposal occurred during their tenures.[6] Two additional district courts outside the Fourth Circuit have cited the circuit court's decision below with approval.[7]

Moreover, the minority view reflected in the three district court cases cited by Petitioner is distinguishable on their facts and thus not in conflict with the decision

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which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions.") (quoting *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982)); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1436 (S.D. Ohio 1984) (disposal under RCRA need not result from any affirmative action by the defendant); *United States v. Diamond Shamrock*, No. Civ. C80-1857, 12 Envtl. L. Rep. 20,819, 17 E.R.C. 1329, 1333 (N.D. Ohio 1981) (Westlaw, DCT) ("A [RCRA] 'disposal' clearly requires no active human conduct"); *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) ("RCRA disposal need not result from affirmative action by the defendants but may be the result of passive inaction").

[6] *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 579 (W.D. Mich. 1991); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659 (E.D. Cal. 1990) (specifically rejecting the rationale of *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989) on which Petitioner relies); *Guidice v. BFG Electroplating and Mfg. Co., Inc.*, 732 F. Supp. 556 (W.D. Pa. 1989); *In Re Hemingway Transport, Inc.*, 108 B.R. 378 (Bankr. D. Mass. 1989); *Emhart Industries, Inc. v. Duracell Int'l Inc.*, 665 F. Supp. 549 (M.D. Tenn. 1987).

[7] *Hatco Corp. v. W.R. Grace & Co.*, 1992 U.S. Dist. LEXIS 11462 (D. N.J. 1992); *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 1992 WL 153075 (S.D. Ind. 1992) (construing substantially identical state law definition of disposal to include leakage from underground tanks, citing the court of appeals' decision below as persuasive authority).

below. Each of those cases determined that continued migration and leaching of contaminants after the initial placement of wastes at a site does not constitute disposal as defined by CERCLA.[8] Despite the questionable merit of that interpretation, it is unlikely that this Court would reach that issue in this case because, as the Fourth Circuit read the record, the tanks in this case were *leaking* and thus disposing of additional contaminants into the environment during Mumaw's ownership.

C. Finally, the district courts excluded interim owners from liability under Section 107(a)(2) in the cases cited by Petitioner because they thought that a contrary decision would subject to liability every person in the chain of title to contaminated property, a concern Petitioner also raises. But Congress has enacted a specific provision in Section 107(b)(3) to protect "innocent" interim owners. Under that Section, an interim owner can avoid CERCLA liability by proving, *inter alia*, that the hazardous substance release was caused solely by the act or omission of an unrelated third party and that he took

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[8] *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984 (E.D. Mich. 1991); *In Re Diamond Reo Trucks, Inc.*, 115 B.R. 559 (Bankr. W.D. Mich. 1990); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989). *United States v. Petersen Sand and Gravel, Inc.*, 1992 U.S. Dist. LEXIS 13268 (N.D. Ill. 1992), was decided after the Petition was filed in this case and joins the minority view. *3550 Steven Creek Associates v. Barclays*, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2014 (U.S. 1991), cited by Mumaw, is entirely inapposite. The Ninth Circuit there held that asbestos in non-waste form is not disposed within the meaning of CERCLA when it is incorporated into building materials. In other words, the use of a commercial product does not meet the statutory definition of "disposal."

due care with respect to the hazardous substances.[9] Truly "innocent" interim owners who are *potentially* liable as owners at the time of disposal can avoid CERCLA liability by interposing the third-party defense. On the other hand, as the Fourth Circuit points out, owners who ignore environmental threats on their properties cannot and should not avoid liability as the minority view would allow.

In sum, the decision below is consistent with the terms of the statute and follows the prevailing judicial interpretation of Section 107(a)(2) which imposes liability on defendants who own facilities when hazardous substances are leaking. To construe the statute differently would both ignore its plain terms and reward property owners who are indifferent to environmental threats on their properties while penalizing more conscientious owners, like Nurad, who perform voluntary cleanups.

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[9] Section 101(35) extends this "third-party defense" to defendants who had no reason to know the property was contaminated when they acquired it. Section 101(35)(C), on which Petitioner relies, provides that this "innocent purchaser" variation of the defense will not be available if the defendant discovers contamination during his ownership and fails to disclose it to a purchaser. To the extent Section 101(35)(C) has any bearing on the issues in this case, it is restricted to the Section's implicit acknowledgement that interim owners are potentially liable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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